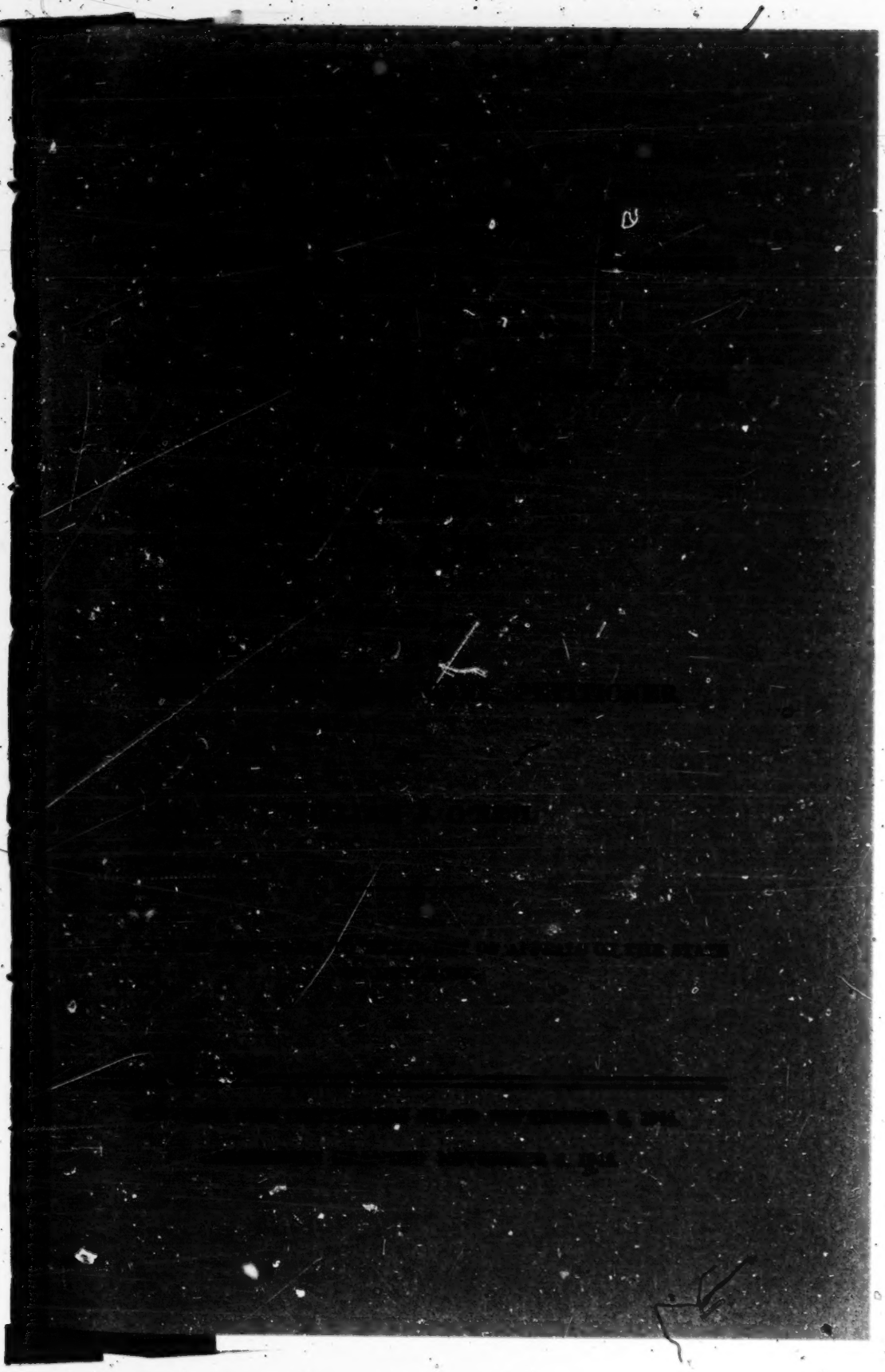

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK, PETITIONER,

vs.

WILLIAM J. O'NEIL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Notice of Appeal to Court of Appeals	83	61
Order of Appellate Division Granting Leave to Appeal to Count of Appeals	84	62
Order of Modification and Affirmance, Appealed From	86	62
Judgment of Modification and Affirmance, Appealed From	87	63
Per Curiam Opinion of Appellate Division, First Department	90	65
Dissenting Opinion of Callahan, J.	92	66
Stipulation as to Exhibits	103	73
Stipulation Waiving Certification of Record to Court of Appeals	104	73
INDEX TO RECORD IN APPELLATE DIVISION		
Statement Under Rule 234	1	1
Notice of Appeal to Appellate Division	71	54
Order Granting Leave to Appeal to Appellate Division	73	55
Order of Reversal	74	56
Judgment of Reversal	76	57
Opinion of Appelate Term	79	59
Stipulation as to Exhibits	81	60
Stipulation Waiving Certification to Appellate Division	82	60

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Record on appeal to Court of Appeals of New York—Continued

INDEX TO RECORD IN APPELLATE TERM

	Original	Print
Note of Appeal to Appellate Term	2	2
Summons	4	2
Complaint	5	3
Answer	8	5
Exhibit "A"—Release, dated November 13, 1942	11	7
Decision After Trial	12	8
Judgment	13	9
Case and Exceptions	16	10
Motions to Dismiss Complaint	17, 53, 66	11
Motion to Amend Fourth Paragraph of Complaint—Granted	18	11
Motion to Dismiss Defenses Contained in Answer	53	41
Decisions on Motions	67	51
Stipulation Re Exhibits	68	52
Affidavit of No Opinion	69	52
Stipulation Waiving Certification and Settlement to Appellate Term	70	53
PLAINTIFF'S WITNESSES		
William Joseph O'Neil:		
Direct	19	12
Cross	24	16
Redirect	25	17
(Rebuttal)		
Direct	66	50
Robert Gentles:		
Direct	25	18
Cross	30	22
Redirect	31	22
Mollie J. Walder:		
Direct	32	23
Cross	33	24
Samuel Brecker:		
Direct	34	25
Cross	36	27
Redirect	37	28
Hyman Gilbert:		
Direct	38	28
Cross	40	30
Herbert Early:		
Direct	41	31
Cross	42	32
Redirect	43	32
Edward M. Reece:		
Direct	43	33
Cross	45	34

Record on appeal to Court of Appeals of New York—Continued

PLAINTIFF'S WITNESSES—Continued

	Original	Print
Frances Emily Donohue:		
Direct	45	35
Cross	46	36
Redirect	47	36
Fannie Daych:		
Direct	48	37
Frederick Davis:		
Direct	50	39

DEFENDANT'S WITNESS

Frederick Davis:		
Direct	54	42
Cross	61	47
Redirect	65	50
Remittitur of Court of Appeals	105	75
Order on remittitur	110	77
Final judgment	112	78
Clerk's certificate	115	81
Order allowing certiorari	116	83

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

WILLIAM J. O'NEIL, Plaintiff-Respondent,

against

BROOKLYN SAVINGS BANK, Defendant-Appellant

STATEMENT UNDER RULE 234

This action was commenced by the service of a summons and complaint on or about the 6th day of February 1943.

Issue was joined by the service of an answer on or about the 11th day of February 1943. The action was tried before the Hon. William T. Keleher without a jury on the 15th day of March 1943 and the Court dismissed the complaint without an Opinion.

The case was then appealed to the Appellate Term of the Supreme Court First Department, which by order entered the 10th day of June 1943 reversed the determination of the Municipal Court with $30 costs and directed judgment in favor of the plaintiff for $623.16 with interest on $423.16 from August 30, 1940 and costs.

The Appellate Term by order dated July 7, 1943 granted leave to appeal to the Appellate Division First Department and on August 5, 1943 the Defendant-Appellant served and filed notice of appeal to the Appellate Division. [fol. 2] The name of the original plaintiff is William J. O'Neil.

The name of the original defendant is The Brooklyn Savings Bank.

The Plaintiff's attorneys until after the determination of the Appellate Term were Stein, Solomon & Simon, but by stipulation dated August 9, 1943 Max R. Simon of 225 West 34th Street, New York City, was substituted as attorney for the plaintiff.

Defendant's attorneys are Snedeker & Snedeker, 164 Montague Street, Brooklyn, New York.

There has been no change of parties or attorneys herein except as above stated.

In Municipal Court of the City of New York, Borough of Manhattan, First District

William J. O'Neil, Plaintiff,

against

Brooklyn Savings Bank, Defendant

Notice of Appeal to Appellate Term

Sirs:

Please take notice, that the plaintiff William J. O'Neil herewith appeals to the Appellate Term of the Supreme Court in and for the First Judicial Department from a [fol. 3] judgment entered in the within entitled action in the office of the Clerk of this Court on the 16th day of March, 1943, awarding costs to the defendant herein in the sum of $41.00 and dismissing the complaint herein,—as well as from each and every part thereof.

Dated, New York, March 18, 1943.

Yours, etc., Stein, Solomon & Simon, Attorneys for Plaintiff, Office & P. O. Address, 225 West 34th Street, Borough of Manhattan, City of New York.

To: Snedeker & Snedeker, Esqs., Attorneys for Defendant, 164 Montague Street, Brooklyn, New York.

[fol. 4] In Municipal Court of the City of New York, Borough of Manhattan, First District

Plaintiff's Address, 203 East 77th Street, Borough of Manhattan.

Classification No. B 27

William J. O'Neil, Plaintiff,

against

Brooklyn Savings Bank, Defendant

Summons

To the above named Defendant:

You are hereby summoned to appear in this action in the Municipal Court of the City of New York, Borough of

Manhattan, First District, before the Clerk of the said Court, at his office at 8 Reade Street, in the Borough of Manhattan, in the City of New York, within five days after the service of this summons upon you, exclusive of the day of service, and to make answer to the complaint; and if you fail to make answer, judgment will be taken against you for the sum of $673.16 with interest thereon from the 1st day of September, 1940, together with the costs of this action.

Dated, New York City, the 4th day of February, 1943.

Stein, Solomon & Simon, Attorneys for Plaintiff, Office & P. O. Address, 225 West 34th Street, Borough of Manhattan, New York City.

[fol. 5] In Municipal Court of City of New York

[Same Title]

Complaint

Plaintiff, complaining of the defendant, by Stein, Solomon & Simon, his attorneys, respectfully shows to this Court and alleges:

First: That at all the times hereinafter mentioned plaintiff was and still is a resident of the Borough of Manhattan, City and State of New York.

Second: That at all the times hereinafter mentioned, the defendant, a domestic corporation, was and still is the owner of the loft building and premises known as and located at No. 443 Fourth Avenue, Borough of Manhattan, City of New York.

Third: That plaintiff was employed by and on behalf of the defendant as a night watchman at, and for, the aforementioned loft building at 443 Fourth Avenue, Borough of Manhattan, City of New York, from the month of September, 1938 up to and including the month of August, 1940.

Fourth: Upon information and belief, that during the entire period of plaintiff's employment herein, some or many of the tenants or occupants in said loft building were engaged in interstate commerce or were engaged in the production of goods for interstate commerce.

Fifth: That the duties or services required to be performed by plaintiff, and actually performed by him during the course of his employment herein, were such as were necessary to the production of goods for interstate com- [fol. 6] merce by the tenants or occupants of said loft building, or were necessary to their engaging in interstate commerce.

Sixth: That each and every week of his employment herein, plaintiff was required to work, and actually did work, at least fifteen (15) hours in excess of the maximum weekly number of hours permitted and prescribed by the United States Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A., Sections 201 et seq.

Seventh: That, in violation of Sections 7 and 16 of the said Fair Labor Standards Act of 1938, plaintiff never received any overtime compensation from the defendant herein, or from anyone else, each week as the same became due, owing and payable, for the number of hours he worked each week in excess of the maximum therein permitted and prescribed.

Eighth: That the total amount of overtime compensation earned by the plaintiff during the course of his employment herein, was the sum of Four Hundred Twenty-three and 16/100 ($423.16) Dollars. Said sum represents overtime compensation based upon a rate equal to one and one-half (1½) times the regular rate at which plaintiff was employed herein.

Ninth: That sometime after the expiration of plaintiff's employment herein, the defendant did pay to the plaintiff the sum of Four Hundred Twenty-three and 16/100 ($423.16) Dollars as overtime compensation herein, although as has been hereinbefore set forth, it had failed, neglected and refused to pay plaintiff the particular sum earned by him as such overtime compensation each week as the same became due, owing and payable.

[fol. 7] Tenth: That by virtue of the foregoing, and particularly because of the failure of the defendant to pay the required overtime compensation to the plaintiff each week as the same became due, owing and payable, there is now due and owing to the plaintiff from the defendant, by virtue of Section 16 of the said Fair Labor Standards

Act of 1938, an additional sum of Four Hundred Twenty-three and 16/100 ($423.16) Dollars as liquidated damages, —no part of which has been paid although duly demanded.

Eleventh: That by virtue of the foregoing and in accordance with Sections 7 and 16 of the Fair Labor Standards Act of 1938, there is also now due and owing from the defendant to the plaintiff the sum of Two Hundred Fifty ($250.00) Dollars as and for reasonable attorney's fees herein.

Wherefore, plaintiff demands judgment against the defendant in the sum of Four Hundred Twenty-three and 16/100 ($423.16) Dollars, with interest from the 1st day of September, 1940, together with the costs and disbursements of this action, and further respectfully prays that this Court award and allow to his attorneys herein, in addition, the sum of Two Hundred Fifty ($250.00) Dollars as and for reasonable attorney's fees to be paid by the defendant.

Stein, Solomon & Simon, Attorneys for Plaintiff,
Office & P. O. Address, 225 West 34th Street,
Borough of Manhattan, City of New York.

[fol. 8] In Municipal Court of City of New York

[Same Title]

Answer

Defendant The Brooklyn Savings Bank, by Snedeker and Snedeker, its attorneys, answers the complaint herein as follows:

1. Defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in the paragraphs of the complaint numbered, First, Fourth, Fifth or Sixth, or in either of them.

2. Defendant denies each and every allegation contained in the paragraphs of the complaint numbered Seventh, Eighth, Tenth and Eleventh, or in either of them.

3. Defendant denies each and every allegation contained in paragraphs of the complaint numbered Second, except

that the defendant, a domestic corporation, has owned the building and premises known as and located at No. 443 Fourth Avenue, Borough of Manhattan, City of New York, since July 24, 1941.

4. Defendant denies each and every allegation contained in paragraph of the complaint numbered Third, except that plaintiff was employed by and on behalf of the defendant as a night watchman at and for the building 443 Fourth Avenue, Borough of Manhattan, City of New York from November 5, 1938 to and including August 30, 1940.

[fol. 9] 5. Defendant denies each and every allegation contained in paragraph of the complaint numbered Ninth except that at some time after the expiration of plaintiff's employment defendant did pay to the plaintiff the sum of $423.16.

For a first separate and complete defense defendant alleges:

6. That on or about the 13th day of November, 1942 and subsequent to the termination of plaintiff's employment by or on behalf of the defendant and prior to the commencement of this action plaintiff and defendant agreed that in consideration of the sum of $427.43 (less the sum of $4.27 Social Security deduction) to be paid by defendant to plaintiff that plaintiff would release and discharge the defendant from any and all claims for overtime employment, debts, damages, or liabilities arising out of or in connection with any claims of the plaintiff of any kind or character whatsoever growing out of overtime employment, under or by virtue of the Fair Labor Standards Act; and that thereupon and in pursuance of said agreement the plaintiff executed and delivered to the defendant a release in writing (a true copy of which is annexed hereto, marked Exhibit A) and that simultaneously with the execution and delivery of said release the defendant did pay to the plaintiff the aforesaid sum of $427.43 (less the sum of $4.27 retained as aforesaid for Social Security).

7. That by the execution and delivery of said release and the payment to and acceptance by the plaintiff of the aforesaid sum of money as set forth in the next preceding [fol. 10] paragraph the plaintiff did release and discharge the defendant from any and all claims, debts, damages, or

liabilities arising out of or in connection with any claims of the plaintiff of any kind or character whatsoever growing out of any overtime employment of the plaintiff by or on behalf of the defendant mentioned in the complaint herein.

For a second and partial defense defendant alleges:

8. If it be held herein that plaintiff is entitled to recover liquidated damages and an attorney's fee under Section 16-B of the Fair Labor Standards Act, then such application of said Act or said Section thereof would be and is unconstitutional under the Fifth Amendment to the Constitution of the United States in that it would deprive the defendant of its property without due process of law.

Wherefore defendant demands judgment dismissing the complaint with costs.

Snedeker and Snedeker, Attorneys for Defendant, Office & P. O. Address, 164 Montague Street, Brooklyn, New York.

(Verified February 10, 1943.)

[fol. 11] EXHIBIT "A", ANNEXED TO ANSWER

New York City, N. Y.
Nov. 13, 1942.

Whereas, the undersigned was employed by The Brooklyn Savings Bank, Clinton & Pierrepont Sts., Brooklyn, N. Y., herein called Employer, for all or part of the period of time between October 24th, 1938, when the Fair Labor Standards Act became effective, and April 20, 1942, under certain collective bargaining agreements between Realty Advisory Board on Labor Relations, Incorporated and Building Service Employee's International Union, Local 32-B, the last of which expired April 20, 1942, and while so employed did at times work more hours per week than the standard maximum hours provided by the Fair Labor Standards Act; and

Whereas, the undersigned has demanded overtime pay for all hours worked for the "Employer" in excess of the standard maximum hours prescribed by the Fair Labor Standards Act; and

Whereas, the actual amount of overtime pay due from the "Employer" for the period of time when the undersigned was employed by the "Employer" between October 24, 1938 and April 20, 1942, if any such overtime is due, is difficult of ascertainment; and

Whereas, there is uncertainty as to whether the undersigned has an enforceable claim; and

[fol. 12] Whereas, the parties desire to settle said claim without litigation, and thus to avoid the delays and uncertainties incident thereto;

Now therefore, the undersigned, in consideration of the payment to him of the sum of $427.43 by the "Employer" receipt of which is hereby acknowledged, accepts said payment as full settlement of all of his claims for overtime employment, and releases and discharges the "Employer", and all persons associated or acting with the "Employer" in connection with said matter, from any and all claims, debts, damages, or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment as aforesaid, less Social Security $4.27.

William J. O'Neil, Employee.

Witness Frederick Davis.

In Municipal Court of City of New York

[Same Title]

Decision After Trial

Present William T. Keleher

I hereby find and decide that after trial defendant is entitled to judgment, complaint dismissed and I order and adjudge that said defendant have judgment accordingly.

William T. Keleher.

Dated: March 15, 1943.

[fol. 13] In Municipal Court of City of New York

Index No. 1625—1943

[Same Title]

Judgment

Judgment rendered in favor of the Brooklyn Savings Bank, defendant, located at Clinton & Pierrepont Streets, Borough of Brooklyn, City of New York.

Costs by Statute	$40.00
Prospective Marshal's Fee	1.00
Total	$41.00

State of New York,
County of Kings, ss:

Sedgwick Snedeker being duly sworn, deposes and says that he is an attorney at law associated with Snedeker & Snedeker the attorneys for the defendant in the above entitled action. That the disbursements above specified have been or will necessarily be made or incurred therein and are reasonable in amount; that a decision has been rendered after a trial in favor of the defendant dismissing the complaint, and ordering that defendant have judgment accordingly.

Sedgwick Snedeker.

Sworn to before me this 16th day of March, 1943.
Elizabeth Frewen, Notary Public, Kings County.

[fol. 14] Judgment entered the 16th day of March 1943.

The summons and complaint in this action having been personally served on The Brooklyn Savings Bank the defendant herein on the 5th day of February 1943 and the judgment rendered in favor of defendant against said plaintiff after a trial on the 15th day of March 1943.

Now on motion of Snedeker & Snedeker attorneys for the defendant it is,

Adjudged that the Brooklyn Savings Bank located at Clinton & Pierrepont Streets, Borough of Brooklyn, City

of New York defendant, have judgment dismissing the complaint herein; and the same hereby is dismissed, and do recover of William J. O'Neil plaintiff, the sum of $41.00 as costs and that the plaintiff have execution therefor.

Robert Duffy, Clerk.

[fol. 15] Sir:

Please take notice that the within is a true copy of a judgment made and entered in the within entitled action and duly filed in the office of the Clerk of the within named court on the 16th day of March, 1943.

Dated, March 16th, 1943.

Yours, etc., Snedeker & Snedeker, Attorneys for Defendant, Office and Post Office Address, 164 Montague Street, Borough of Brooklyn, New York City.

To Stein, Solomon & Simon, Esqs., Attorneys for Plaintiff, Office and Post Office Address, 225 West 34th Street, Borough of Manhattan, New York City.

[fol. 16] In Municipal Court of City of New York

Index Number 1625/1943

Tried at Central Jury Court, Non-Jury Part

[Same Title]

Case and Exceptions

Tried, March 15, 1943.

Before Hon. William T. Keleher, Justice.

Appearances:

Stein, Solomon & Simon, Esqs. (Max R. Simon, of Counsel), 225 West 34th Street, New York City, Attorneys for Plaintiff.

Snedeker & Snedeker Esqs., (S. Snedeker, of Counsel), 164 Montague Street, Brooklyn, New York, Attorneys for Defendant.

Samuel W. Jacobs, Official Stenographer.

Plaintiff's Counsel: I respectfully move to amend the summons in this action and the complaint by changing

the amount sought therein for reasonable attorney's fees to the sum of $400.

Defendant's Counsel: I respectfully object to that. Counsel here has shown no reason whatever for any in-
[fol. 17] crease in the value of the services. I leave that to your Honor's discretion.

Plaintiff's Counsel: Notice has been served upon them prior to the trial.

Defendant's Counsel: It was in the form of a letter.

The Court: The amount on the summons is 673.16. Are you increasing the amount?

Plaintiff's Counsel: The principal amount is 423 plus 250 attorney's fees. I want to increase that by another $200.

The Court: I will reserve decision on the motion to increase it.

Defendant's Counsel: Will your Honor entertain a motion to dismiss the complaint at this time?

The Court: Yes, surely.

Motion to Dismiss Complaint

Defendant's Counsel: The fourth paragraph of plaintiff's complaint alleges "upon information and belief that during the entire period of plaintiff's employment herein some or many of the tenants or occupants in said loft building were engaged in the production of goods for interstate commerce." I respectfully submit that the plaintiff's complaint in this action is insufficient in that it fails to state facts sufficient to constitute a cause of action. Under the case of Kirshbaum *v.* Walling, which, I take it, is the case upon which plaintiff relies in this action, that case was upon an agreed state of facts that all the tenants of the building were engaged in interstate commerce, and the furthest the case does go is that in order to establish a covered employee it must be shown that the tenants in the building where the employee was employed, that is, of the tenants a substantial number of tenants were principally engaged in interstate commerce. And I respectfully submit the allegation that some or many of
[fol 18] the tenants, or rather occupants, in said loft building were engaged in interstate commerce, engaged in the production of goods for interstate commerce is insufficient.

The Court: Do you wish to reply to that?

Plaintiff's Counsel: In view of the criticism levelled towards that allegation, I therefore respectfully move the Court to amend that paragraph four in the complaint to read as follows: Upon information and belief, that during the entire period of plaintiff's employment herein a substantial amount of the tenants or occupants in said loft building were engaged in interstate commerce and or were engaged in the production of goods for interstate commerce. I might mention in that respect, if your Honor please, that the proof in this case will show substantially that allegation. In other words, the allegation is being amended in order to conform to the proof which will be introduced.

Defendant's Counsel: As I have stated before, it is my belief that the case of Kirshbaum *v.* Walling establishes not only that a substantial number of tenants must be engaged in interstate commerce, but it must be shown that those tenants must be principally engaged, they must be principally engaged in interstate commerce, not that they may have had incidental transactions from time to time, but that must be their principal business, interstate commerce.

The Court: Do you object to the amendment?

Defendant's Counsel: I leave it to your Honor's discretion.

The Court: I would be inclined to grant it unless you object to it. I will reserve decision.

Defendant's Counsel: I can't see that there is any surprise here.

The Court: I will grant the amendment.

[fol. 19] William Joseph O'Neil, plaintiff, 203 East 77th Street, New York, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Plaintiff's Counsel:

Q. Mr. O'Neil, you are the plaintiff in this action, are you not?

A. Yes, sir.

Q. You are the man that is suing the bank?

A. Yes, sir.

Plaintiff's Counsel: If please the Court, I like to respectfully refer the Court's attention to paragraph four in the answer where defendants admit that they employed the plaintiff as a night watchman for the building 443 Fourth Avenue, Borough of Manhattan, City of New York, from November 5, 1938, to and including August 30, 1940.

Q. Your duties I take it, Mr. O'Neil, at this building, were that of night watchman?

A. That's right.

Q. How big a building is that, Mr. O'Neil?

A. It is an eleven-story building.

Q. How many elevators does it have?

A. Three elevators—two front cars and a freight car.

Plaintiff's Counsel: I call upon counsel for the defendant at this time to concede that from the 5th day of November, 1938, to the 3rd of May, 1940, this plaintiff was required to work 72 hours a week.

Defendant's Counsel: That is correct, yes.

Plaintiff's Counsel: I now further call upon counsel to [fol. 20] concede that this plaintiff——

Defendant's Counsel: Just a minute, there is no allegation in the complaint that they worked that many hours.

Plaintiff's Counsel: I will ask you to concede that by virtue of the examination before trial.

Defendant's Counsel: We will concede that, yes.

Plaintiff's Counsel: I call upon counsel for the defendant to further concede from the 4th day of May, 1940, to the 30th day of August, 1940, this plaintiff was required to work 59 hours a week.

Defendant's Counsel: That's correct.

Q. Mr. O'Neil, during this period I mentioned at first, that is, from November 5th to May 3, 1940——

Defendant's Counsel: Just a minute. Lest there be any mistake, so the concession is made that those were the regular hours under the agreed rate of pay. There is no concession he actually worked that number of hours. It is merely a concession those are the agreed regular working hours per week.

The Court: Very well.

Q. Mr. O'Neil, from November 5, 1938, to May 3, 1940, will you kindly tell his Honor how many hours a day you worked for how many days a week?

A. I worked—I started working at 8 o'clock at night and finished at 7 in the morning, six nights a week, without any lunch hour.

[fol. 21] Q. From May 4, 1940, to August 30, 1940, kindly tell the Court how many hours a night you worked for how many days a week.

A. I started Monday through Friday from 8 to 7 with one hour for lunch. Saturday night I worked from 9 at night to 7 in the morning, with one hour for lunch.

Plaintiff's Counsel: I believe counsel will concede that the first period I mentioned was 72 hours a week and the second period was 59 hours a week.

Defendant's Counsel: Those were regular work weeks?

Plaintiff's Counsel: Yes.

Q. And did you actually work each and every week of your employment at that building the hours you just mentioned?

A. I did.

Q. To the best of your recollection, Mr. O'Neil, did you lose any time for illness?

A. I did not lose any time.

Q. No time for illness?

A. No time, to the best of my recollection.

Q. In other words, to the best of your recollection, from November 5, 1938, to May 3, 1940, you actually worked 72 hours each and every week?

A. I did.

Q. And to the best of your recollection, from May 4, 1940, to August 30, 1940, you actually worked 59 hours a week?

A. I did.

Q. And that was 59 hours a week for each and every week of the period I have just set forth?

A. That's right.

Plaintiff's Counsel: I now call upon counsel for the defendant to concede that plaintiff's salary from Novem-

[fol. 22] ber 5, 1938 to April 21, 1939, was $23 a week.

Defendant's Counsel: It was $23 a week for a work week of 72 hours.

Plaintiff's Counsel: I will take that concession. To clarify the record I will ask counsel to concede that the salary of $23 a week was the salary paid to this plaintiff for a 72 hour week.

Defendant's Counsel: That was the agreed salary.

Plaintiff's Counsel: Yes. I further call upon counsel for the defendant to concede that from April 21, 1939, to the end or termination of plaintiff's employment here, his salary was $24 a week.

Defendant's Counsel: You will have to split it up in two periods.

Plaintiff's Counsel: Nevertheless, his salary was $24 a week.

Defendant's Counsel: I will concede that during the period from October 21, 1939, through May 3, 1940, the plaintiff's agreed salary was $24 for a regular work week of 72 hours and during the period, from the period May 4, 1940, to August 30, 1940, $24 for a regular work week of 59 hours.

Q. I again ask you, Mr. O'Neil, to the best of your recollection, you lost no time for sickness during that period?

A. I did not.

Q. In other words, you worked the amount of hours required of you each and every week of your employment?

A. Yes, sir.

Q. Actually worked?

A. Yes, sir.

[fol. 23] Q. Last year, some time, Mr. O'Neil, did you have occasion to see Mr. Davis?

A. Yes, I did.

Q. Mr. Davis is employed by the Brooklyn Savings Bank?

A. That is correct.

Q. Will you kindly tell the Court how you happened to see Mr. Davis?

A. I met friend of mine who told me Mr. Davis was looking for me, that he had a check for me.

Q. When about was that?

A. That was in the latter part of November or early in December.

Q. 1942?

A. 1942. And I went over to the Brooklyn Savings Bank, and I saw Mr. Davis and he gave me the check that was due me.

Q. He gave you a check for $423.16?

A. That's correct.

Q. Was any discussion had between you and Mr. Davis at the time he gave you the check?

A. Mr. Davis said, made a remark, something that he had a check, one half a thousand dollars and they couldn't locate me.

Q. Mr. O'Neil, at the time you got that check for 423.16, he asked you to sign a certain paper?

A. That is right.

Q. At the time you got the check and signed the paper, did Mr. Davis say anything to you about, "We do not know exactly how many hours you worked"?

A. No, he did not.

Q. Did he say to you, "Mr. O'Neil, we are not sure that you are covered under the Wages and Hours Act"?

A. No, he did not.

Q. Did he say anything about, that maybe you are not entitled to anything at all?

A. No, he didn't.

[fol. 24] Cross-examination.

By Defendant's Counsel:

Q. Mr. O'Neil, you read this paper there that you signed? You read it through before you signed it?

A. No, sir, I didn't.

Q. You just took this check for one-half a thousand dollars, and you signed it? Just took the paper and signed your name to it?

A. Yes, sir.

Q. You saw there was writing on it?

A. Yes, sir.

Q. But you never bothered to read it?

A. No, sir.

Q. Let me ask you, Mr. O'Neil, during the entire period of your employment, you signed work sheets, did you not?

A. Yes, sir; every week.

Q. Covering the—in which it was stated number of hours you worked, that you were hired to work each week, total salary and amount received by you?

A. Yes, sir.

Q. And each week you took your salary and receipted for it?

A. Yes, sir.

Q. Did you ever at any time, ever at any time protest that you were entitled to more money than you had received?

Plaintiff's Counsel: I object to that. After the Court has held, in a decision said that that question is objectionable, failure on the part of the employee to protest is not a defense.

The Court: Overruled.

Defendant's Counsel: I think it is alleged in the complaint that we refused to pay, that the defendant in this case refused to pay, and since no demand was ever made——

[fol. 25] Q. You never made any demand and the first time—you never made any demand upon the bank for payment until this suit was instituted, is that correct?

A. That's right.

Q. Mr. O'Neil, you stated that you knew the contents of these weekly work sheets?

A. Yes, sir.

Q. You said—one-half a thousand dollars—when you signed this paper. How does it happen that you were unware of the contents of that paper you signed?

A. I might have took it for granted that everything was all right.

Q. Was it your normal habit to sign any paper proffered to you?

A. If a check is attached to it.

Q. You are able to read the English language?

A. I am.

Defendant's Counsel: That is all, your Honor.

Redirect examination.

By Plaintiff's Counsel:

Q. In other words, I take it your position at the time you got that check was that you were mighty glad to get that check and you ran the moment you got it?

A. That's right.

ROBERT GENTLES, 1696 Second Avenue, New York City, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Gentles, what is your occupation?

A. Truck driver.

[fol. 26] Q. Were you employed by the Herman Furniture Company?

A. I was.

Plaintiff's Counsel: At this time, will counsel concede that Herman Furniture Company is one of the tenants of the building in question during the course of plaintiff's employment.

Defendant's Counsel: Yes, I concede that.

Q. How long were you employed by Herman Furniture Company?

A. Seven and one-half years.

Q. Were you so employed from November 5, 1938, to August 30, 1940?

A. Yes.

Q. You were so employed?

A. Yes.

Q. I take it, Mr. Gentles, that the Herman Furniture Company was engaged in the business of buying and selling furniture?

A. That's correct.

Q. How much space did they occupy in that building?

A. Three floors and a basement.

Q. Do you know, Mr. Gentles, where the furniture came from that they purchased?

A. Yes.

Q. Will you kindly tell the Court where?

A. Some come from Grand Rapids.

Q. That is Michigan?

A. Yes, sir. Some from Rockford, Illinois. And a lot of places furniture came from, about 80 per cent of the furniture come from out of town, out of state.

Q. In other words, 90 per cent of the furniture which came into their premises came from points outside of the State of New York?

A. That's correct.

Q. In your opinion, Mr. Gentles, what portion of the furniture that was sold and delivered by Herman Furniture [fol. 27] Company, was sold and delivered to customers outside of the State of New York?

Defendant's Counsel: Your Honor, I object to this. I do not think this witness is a competent witness for this purpose. I am quite sure that his knowledge in this matter is merely expressing an opinion as to the business. I do not think anybody is competent to testify in behalf of these tenants, other than the business manager or a person in the actual conduct of the business. He is a shipping clerk or truck driver.

The Court: How would he know about that?

Plaintiff's Counsel: He was the truckman.

The Court: I will take it subject to a motion to strike out. Show what he does know.

Q. How much would you say, what portion of the merchandise that was sold and delivered by the Herman Furniture Company was sold and delivered to customers outside of the State of New York?

A. I would say one-half of the furniture delivered out of 443 Fourth Avenue went to New Jersey or Connecticut.

Q. They did a wholesale business?

A. That is correct.

Q. Were you the man that delivered the furnifure?

A. I was.

Q. You also worked on the floor?

A. I did.

Q. Is there any question in your mind, Mr. Gentles, that a substantial portion of the furniture which was sold and [fol. 28] delivered by the Herman Furniture Company was sold and delivered to customers outside of the State of New York?

A. That is correct.

Q. And these shipments of merchandise from states outside of New York into New York, and shipment again from New York outside of New York, were they regular and continuous shipments?

A. Continuous, yes, during the time we were in that building.

Q. Were they purely casual and incidental?

A. I don't know what you mean.

Q. Once in a while did that happen, or regularly?

A. It happened every week.

Q. Every day of the week?

A. Every day of the week, yes.

Q. The furniture that came in, was that all finished furniture?

A. Not all finished furniture.

Q. Did a lot of the furniture which came in require further work on it?

A. Yes, it had to be finished.

Q. Tell the Court what had to be done.

A. It come in the raw wood and had to be colored, made into walnut or mahogany, whatever the case may be.

Defendant's Counsel: I object to this witness testifying. It is entirely hearsay. He has no knowledge which person stains——

The Court: Overruled.

Q. Did you see that furniture being finished?

A. I did.

Q. Every day in the week?

A. Every day in the week, yes.

Q. And a good proportion of the furniture which came in had to be finished?

A. Yes, sir.

[fol. 29] Q. Had to be sprayed?

A. Correct.

Q. And they had men working for them who finished this furniture?

A. Correct.

Q. Each and every day of the week?

A. Right.

Q. And that is the same furniture that kept going out of the state?

A. Correct.

Q. Were any of the deliveries that were delivered to the Herman Furniture Company—question withdrawn. Did Herman Furniture Company have to assemble any furniture on their premises?

A. Yes, tables and such like that, dining room and dinette tables had to be assembled after they came in.

Q. In other words, parts of it came in?

A. Yes, sir.

Q. And they had employees assemble those parts into the finished product?

A. That is correct.

Q. And that was a continuous part of their business?

A. That is correct.

Q. It was not purely incidental?

A. No.

Q. And that was a substantial part of their business, assembling these tables?

A. Yes, they had sold a lot of dining room furniture. These things had to be assembled before they went out.

Defendant's Counsel: I respectfully submit this witness may be competent to testify as to seeing work done on the furniture in the building, but he is not competent to testify what percentage of the tenants' of these particular tenants' business, was interstate commerce business. He has no knowledge of the entire scope of the business, and certainly no knowledge of the percentage of the business that were [fol. 30] interstate commerce. I submit as to those questions, his answers are objectionable. I move to strike out those answers.

The Court: Decision reserved on the motion.

Q. Would you say from your personal knowledge, that was one of the principal parts of Herman Furniture Company's business?

A. Yes, sir.

Q. Getting in merchandise from points outside of the State of New York?

Defendant's Counsel: I object to this. I think it is new matter.

A. Yes.

Q. Did you see very much furniture coming in from points in the State of New York?

A. Yes, I did.

Q. In other words, merchandise was coming from both places?

A. That is right.

Q. Where did it come from mostly?

A. From Yorktown, Pennsylvania, from the Yorktown Furniture Company.

Cross-examination.

By Defendant's Counsel:

Q. You drove a truck, did you, for this company?

A. I did.

Q. Did you, in your duties with that company, ever have to take that truck outside of the State of New York?

A. Yes, I did.

Q. Did you ever actually take any goods from outside of the State of New York into the, your office there at the building or into the premises of the building?

A. Yes, we did.

Q. There were facilities at the Herman Furniture Com- [fol. 31] pany in this building for storage?

A. The basement was the part where we stored our furniture.

Q. You stored the furniture there?

A. That's right.

Q. Some of it was brought in from outside of the state?

A. Yes, sir.

Q. And then it would be stored in the building, and when you received orders for it you delivered it in the city?

A. Not in the city. Three days a week we went to Jersey; two days a week to different parts.

Q. But most of your business consisted of deliveries in New York State?

A. I wouldn't say most of it. Three days a week we went to Jersey.

Q. I asked you not the number of days a week you were engaged in delivering. I am asking you—that a substantial, perhaps most of the furniture delivered by you was delivered in the City of New York?

A. No, I wouldn't say most of it, fifty-fifty proposition; I would say half would go out and half in the city.

Redirect examination.

By Plaintiff's Counsel:

Q. You have been here pursuant to a subpoena, were you not?

A. That is right.

Q. Your testimony with reference to the assembly of the furniture and finishing of the furniture is based upon your personal knowledge?

A. That is correct.
Q. You actually saw these operations?
A. That's correct.

Defendant's Counsel: I respectfully renew the motion.
The Court: Decision reserved on the motion to strike out.

[fol. 32] Mollie J. Walder, 76-36 113th Street, Forest Hills, Long Island, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Miss Walder, you are here pursuant to a subpoena, are you not?
A. Right.
Q. In the years 1939, 1940, were you employed by Robert Steinberg?
A. Right, Steinberg Bros.

Plaintiff's Counsel: Counsel, I believe that Robert Steinberg was a tenant in the premises during the years mentioned.
Defendant's Counsel: Yes, I concede that.

Q. They occupied an entire floor during these years, Mrs. Walder?
A. Yes.
Q. What business were they in during those years?
A. Manufacturing, exporting gloves, or importing rather.
Q. You also manufactured gloves, did you not, right on the premises?
A. Yes.
Q. During those years, Mrs. Walder, merchandise kept constantly coming in from points outside of the State of New York into your premises?
A. Yes.

Defendant's Counsel: I object to that.
The Court: Overruled.

Q. What is your position with them, by the way?
A. Office manager.

Q. And you are personally acquainted with those facts, are you not?

A. More or less.

Q. The principal business of Steinberg Bros., however, [fol. 33] during that time, was manufacturing gloves, was it not?

Defendant's Counsel: I object to this, your Honor.

The Court: Overruled.

A. Yes.

Q. And after you got those gloves you sold them to customers outside of the State of New York?

A. Inside and outside of the State of New York.

Q. Your sales to customers outside of the State of New York were a regular part of your business?

A. Yes.

Q. Continuous?

A. Yes.

Q. It was not once a month?

A. No.

Q. In other words, it was regular and continuous?

A. That's right.

Q. And you ship and pack gloves?

A. Yes.

Q. You handle them personally?

A. Not I.

Q. Men employed in the firm?

A. Yes, sir.

Q. Wrapped them in boxes and then sent them out, delivered to points outside of the State of New York, amongst other things?

A. Yes.

Cross-examination.

By Defendant's Counsel:

Q. I think you said you were hired in the capacity——

A. Office manager.

Q. What do you mean by office manager? You mean that you answer inquiries in relation to people coming in to see one of the officers of the business?

A. Not necessarily. No, the managership of an office pertains to all details and routine that comes into the office,

checking credits, checking sales, correspondence, just takes care of a multitude of things.

Defendant's Counsel: That's all.

[fol. 34] SAMUEL BRECKER, 225 West 86th Street, New York City, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Brecker, you are here pursuant to a subpoena, are you not?

A. Yes, sir.

Q. Who are you connected with?

A. Decorator Fabrics.

Plaintiff's Counsel: I believe counsel will concede that Decorator Fabrics, Inc., was a tenant in the premises in question during the period of plaintiff's employment.

Defendant's Counsel: That's correct.

Q. What is your relationship towards this firm, Mr. Brecker?

Defendant's Counsel: I will concede that this tenant was in possession for a portion of the plaintiff's employment in the premises.

Plaintiff's Counsel: What portion?

Defendant's Counsel: You can establish that from your witness.

Plaintiff's Counsel: I am going to ask you to show me your records.

Defendant's Counsel: I will say he was in there from February 1, 1940. You can get it from the witness.

Q. Do you know of your own knowledge, Mr. Brecker, when you moved into that building?

A. January, 1938, I believe.

[fol. 35] Plaintiff's Counsel: I will therefore not take that concession.

Defendant's Counsel: Just a minute. I believe you are referring to—the tenant now under discussion is Decorator Fabrics, is that correct?

Plaintiff's Counsel: Yes.

Defendant's Counsel: Go ahead.

Q. You are in there from 1938?

A. 1938, that's right.

Q. What is the business of Decorator Fabrics, Inc?

A. Wholesale upholstery, drapery materials.

Q. Did you buy merchandise during the years 1930 or 1940 from points outside of the State of New York?

A. Yes.

Q. And were these purchases regular parts of your business?

A. That's right.

Q. Thereafter, when the merchandise came in, Mr. Brecker, did you do anything to those goods on your premises?

A. Yes, we would cut them up and distribute them according to the specifications of the orders we would get.

Q. And after you would cut them up you would then ship them, amongst other things, to customers outside of the State of New York?

A. Yes.

Q. Was that a regular and substantial portion of your business?

A. That's right.

Q. And I take it—it is rather academic—you handled the goods physically while they were in your premises?

A. That is true.

Q. You have these goods dyed to your specifications?

A. On occasions, most of it came in already dyed.

Q. Did you purchase the green goods or the finished product?

[fol. 36] A. Essentially, our purchases consisted of the finished product.

Q. Did you have any machines in your premises?

A. No.

Q. Cutting machines?

A. No.

Q. They were cut by hand?

A. That's right.

Q. And I take it, therefore, that purchasing merchandise from points outside of the State of New York and then delivering them to customers outside of the State of New York was a regular and continuous part of your business?

A. That's true.

Q. And it was a substantial portion of your business?

A. That's true.

Q. As a matter of fact, the principal purchases you made during the time of plaintiff's employment herein was from customers outside of the State of New York?

A. We sell to customers. The principal purchases were not made from customers. They were made from our sources.

Q. You got goods from sources outside of the State of New York?

A. No, I wouldn't say our principal sources, I would say about one-half.

Q. And it was regular and continuous?

A. That's right.

Q. How much space do you occupy in that building, Mr. Brecker?

A. In those years, we occupied, I think, about one thousand feet.

Q. About one-half of a floor?

A. No, about one-quarter of a floor.

Cross-examination.

By Defendant's Counsel:

Q. Mr. Brecker, are you associated with Brecker Fabrics, Inc.?

A. Yes, sir.

Q. In what capacity?

A. I am the treasurer of the company.

[fol. 37] Q. Isn't it true that Decorator Fabrics, Inc., actually were not under a lease in those premises in February, 1940?

A. I signed checks for Decorator Fabrics; for Decorator Fabrics, and we got in there January, 1938.

Q. Decorator Fabrics, Inc., the tenant now being discussed, they were in possession and did not go into possession under a lease until February 1, 1940?

A. You are wrong. We went into possession under that lease in 1938. We went to a different floor in 1940, moved into larger space.

Q. Didn't you conduct a business with your name, under the name of Samuel Brecker, from January 1, 1938, until February 1, 1940?

A. No, sir; I have always been with Decorator Fabrics.

Q. You were not on the lease with the bank?

A. Sure, I was on the lease, as well as the other members of the corporation.

Q. Mr. Brecker, these goods, that portion of the goods of your business which you state were imported from outside the state, you had storage rooms in the building there, did you not, where you kept these goods when they came in?

A. We kept them on our own premises.

Q. Thereafter, as you received orders, you shipped them out?

A. Yes, sir.

Q. They regu-arly came in and remained on your premises for some period of time and were shipped out on being ordered by your customers, is that correct?

A. That is correct.

Redirect examination.

By Plaintiff's Counsel:

Q. Would I be safe in stating that the purchases you made of merchandise from sources outside of the State of [fol. 38] New York and the shipments from the State of New York to customers outside of the State of New York, run into thousands upon thousands of dollars each year?

A. Yes.

HYMAN GILBERT, 3921 45th Street, Sunnyside, Long Island, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Gilbert, I believe you are here pursuant to a subpeona served upon you?

A. Right.

Plaintiff's Counsel: I believe counsel will concede that Mr. Gilbert was a tenant in these premises during the time in question?

Defendant's Counsel: I will concede that Mr. Gilbert was a tenant in possession during a portion of the plaintiff's employment, yes, sir.

Q. Mr. Gilbert, when did you move into that building?

A. I can't remember exactly. I think it was about end of 1938.

Q. November, December?

A. December.

Plaintiff's Counsel: Is that correct?

Defendant's Counsel: No, it is not. I will concede that he was a tenant in possession from March 15, 1940, to the end of plaintiff's employment.

The Witness: I think it was earlier than that. It may [fol. 39] have been after December of 1938. I have been there about four years.

Q. Mr. Gilbert, what is your business?

A. General exporter and representative of several overseas accounts.

Q. From November 5, 1938, up to August 30, 1940, I take it, that your business was buying merchandise that came from points outside of the State of New York, principally, and selling it to customers and delivering it to points outside of the State of New York, is that a correct statement of fact?

A. I would hardly say principally, but generally merchandise might come from anywhere outside of the State of New York.

Q. Was that a substantial part of your business?

A. A fair proportion.

Q. And a regular and continuous part of your business?

A. Yes.

Q. And these transactions ran into thousands of dollars a month?

A. Yes, definitely.

Q. And when the merchandise came in from points outside of the State of New York, you handled the goods physically?

A. A good part of them.

Q. Not you, personally, but your employees.

A. Yes.
Q. You have a stockroom there?
A. Yes, sir.
Q. This merchandise in stock?
A. Yes, sir.
Q. And when you sold it you had to wrap it up?
A. Usually the way other goods, to go overseas.
Q. You assembled goods on the premises?
A. From the point of view of consolidating and packing them.
[fol. 40] Q. And that was a regular and continuous and substantial part of your business?
A. Yes, sir.

Cross-examination.

By Defendant's Counsel:

Q. You said you would bring them together and pack them up and ship them out?
You have testified that you were in possession in the premises from some time in 1938?
A. I said I thought it was some time in 1938. It may have been early in 1938; certainly, I have been there about four years.
Q. Do you know how many leases you signed?
A. Yes, sir; I have signed two leases.
Q. What were the rooms occupied by you in the building?
A. 806 and 807.
Q. You still occupy those rooms today?
A. Yes.
Q. Mr. Gilbert, is that your signature on this lease?
A. It is my siganture.
Q. I hand you this lease. Isn't that a lease covering rooms 807 and 808?
A. It is possible; that is correct, yes.
Q. You testified you occupied rooms 806 and 807.
A. That's right. The entrance is 807. My entrance is 807. 808 is entrance, it is a means of entrance I never used or very, very seldom used. Since it is a stockroom and leads right into the hall, I keep it locked. The only time I open it, when goods are going on to the trucks. It is possible to be in error as to the number of the room.

Defendant's Counsel: Counsel, I show you the lease which Mr. Brecker, who just left the stand—he was in pos-

session—this is the lease on exactly the premises as the [fol. 41] present witness claims he occupied. You won't concede that?

Plaintiff's Counsel: I am not.

The Witness: Certainly this man in possession of the premises should know whether he was in possession or not.

HERBERT EARLY, 1700 Albemarle Road, Brooklyn, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Early, you are here pursuant to a subpoena I served upon you?

A. Yes, sir.

Q. Whom are you employed by?

A. Dodd, Mead & Company.

Q. They are the book publishers?

A. Yes.

Q. Were you with Dodd, Mead & Company from November 5, 1938, to August 30, 1940?

A. Yes.

Q. And at that time, they occupied an entire floor at 443 Fourth Avenue?

A. Yes, sir.

Q. What is your position in that firm?

A. I am assistant to the president.

Q. Mr. Early, during those years was there a constant flow and regular flow of publications of various sorts, such as catalogs, letters, pamphlets, from your premises to points outside of the State of New York?

Defendant's Counsel: I object to that, your honor. I think there is an attempt to lead the witness.

[fol. 42] The Court: I will allow it. Try not to lead the witness. Overruled.

A. Yes.

Q. Roughly, how many letters would you say went out from your office to points outside of the State of New York a day? The question might be academic.

A. A thousand, fifteen hundred.
Q. How many catalogs went out a day?
A. That is difficult to say.
Q. Thousands during the year?
A. Yes.
Q. Many thousands?
A. Yes.
Q. Advertising matter of various sorts?
A. Yes, sir.
Q. Literature of various sorts?
A. Yes.
Q. Do you people publish the books yourselves?
A. Yes, we are publishers.
Q. And is there a constant flow of literature of various sorts coming from outside of the State of New York to your offices at Fourth Avenue, in the usual course of mail, literature, orders from customers, I hope?
A. Yes.
Q. And telegrams?
A. Yes.
Q. You occupied an entire floor, did you, Mr. Early?
A. Yes.

Cross-examination:

By Defendant's Counsel:

Q. Did you actually print any books at the premises there?
A. No.
Q. You just stored books that were manufactured?
A. No, that was a purely a business and editorial office. We had no stockroom there.

[fol. 43] Redirect examination.

By Plaintiff's Counsel:

Q. You composed editorials in that office?
A. Advertising.
Q. You composed advertising matter?
A. Yes.
Q. You had advertising men working there?
A. Yes.
Q. They composed ideas on paper?
A. Yes.

Q. And they later, and those ideas, the finished product later went into, inside journals?

A. Yes, sir.

Q. Went to customers outside of the State of New York?

A. Yes, sir.

Q. And that was a regular and continuous portion of your business?

A. Yes.

Q. At Fourth Avenue?

A. Yes, all our business was done at Fourth Avenue.

Q. Did you have artists working for you up there?

A. Yes, sir.

Q. Creating ideas?

A. Yes.

Q. Pictures?

A. Yes.

Q. And those things were later shipped to customers and sources outside the State of New York?

A. Yes, sir.

Q. Regularly and continuously?

A. Yes.

Defendant's Counsel: That is all, your Honor.

Edward M. Reece, 24 Prince Avenue, Baldwin, Long Island, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Reece, you are here pursuant to a subpoena that was served upon you?

A. Yes.

[fol. 44] Q. Who are you connected with, Mr. Reece?

A. Calree Glove Company.

Plaintiff's Counsel: I believe counsel will concede that Calree Glove Company was a tenant in the premises in question during the term of plaintiff's employment herein?

Defendant's Counsel: We will concede that the Calree Glove Company was a tenant in possession from February

1, 1940, to the end of the plaintiff's employment. I beg your pardon, they occupied different space. We will concede they occupied as tenants in possession from February 1st—yes, during the entire period of plaintiff's employment.

Q. Mr. Reece, what was the business of Calree Glove Company during that time?

A. Jobbing in gloves.

Q. You had gloves manufactured for you?

A. That is right.

Q. Where was this manufacturing done during this time?

A. New York City.

Q. And the gloves would come into your premises?

A. Yes, sir.

Q. Did you have to handle the gloves physically?

A. Right.

Q. Did you have to crate them, pack them?

A. Pack them, right.

Q. During the time in question did you ship gloves to customers outside of the State of New York?

A. I did.

Q. Regularly and continuously?

A. That is right.

Q. And was that a substantial portion of your business?

[fol. 45] A. Not—it was a regular portion of the business.

Q. Many thousands of dollars' worth of business of manufacturing?

A. That is right.

Q. To customers outside of the State of New York?

A. That is right.

Q. You had to pack the goods to customers outside of the State of New York?

A. That is right.

Cross examination.

By Defendant's Counsel:

Q. You never did any actual manufacturing of these goods at the premises, did you?

A. Never.

FRANCES EMILY DONOHUE, 3820 27th Street, Long Island City, Long Island, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Miss Donohue, you are down here pursuant to a subpoena?

A. Yes.

Q. What firm are you connected with?

A. John E. Fuchs Company.

Q. How long has John E. Fuchs been at 443 Fourth Avenue?

A. I believe they took those rooms in 1937. I am not sure that that is the year.

Q. And you have been with them ever since?

A. Since 1935.

Q. In what capacity?

A. Glove packer.

Q. John E. Fuchs is a glove manufacturer?

A. That is right.

[fol. 46] Q. They manufacture right on the premises?

A. Yes.

Q. They get the raw materials from points outside of the State of New York?

A. Yes, sir.

Q. Regularly and continuously?

A. Yes.

Q. And then they manufacture those raw materials right on the premises?

A. That's right.

Defendant's Counsel: I make the same objection as to the witness testifying to the percentage of the business that is interstate. She said she is a glove packer. I do not think she is competent to know.

The Court: Overruled. The Court will pass upon that, Counsel.

Q. You have charge of the shipping, do you not, Miss Donohue?

A. Yes.

Q. From November 5, 1938, up to and including the 30th day of August, 1940, did John E. Fuchs ship the

finished gloves or the gloves that were manufactured on the premises to customers outside of the State of New York?

A. That's right.

Q. Did John E. Fuchs ship these gloves regularly and continuously?

A. Every day.

Q. And these shipments were a regular part of the business?

A. That's right.

Q. Conducted on the premises?

A. That is right.

Q. And the principal functions of John E. Fuchs were manufacturing gloves?

A. Yes.

Cross examination.

By Defendant's Counsel:

Q. You just testified they manufactured gloves. What [fol. 47] did they do in the way of manufacturing gloves?

A. They sewed them by hand and cut them, sewed by the machine.

Q. They created the specimens?

A. Yes, they design there.

Q. They design the gloves there?

A. That is right, and they are cut and sewn there.

Q. How many people would you say were cutting and designing gloves there?

A. Just one.

Q. How many pairs of gloves would she design a month, would you say?

A. Maybe about fifteen or twenty styles, possibly more.

Q. The only manfacturing that was done by this one person, created these designs and submitted them to local merchants in New York?

A. New York and out of state.

Redirect examination.

By Plaintiff's Counsel:

Q. Mr. Snedeker said about twenty designs a month. Did you mean only twenty pairs of gloves were manufactured a month?

A. No.

Q. Thousands upon thousands of pairs were manufactured and shipped to customers?

A. Yes, sir.

Q. Outside of the State of New York?

A. That is right.

Q. You occupy about one-half a floor up there, do you not?

A. Little less.

[fol. 48] FANNIE DAYCH, 825 New York Avenue, Brooklyn, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Miss Daych, you are here pursuant to a subpoena served upon you?

A. Yes.

Q. By whom are you employed, Miss Daych?

A. Wallerstein Textiles.

Q. Were you so employed, Miss Daych, on the 5th day of November, 1938?

A. No, have been with them since June, 1939.

Q. Ever since?

A. Yes.

Plaintiff's Counsel: I believe counsel will concede that Wallerstein Textiles were tenants in those premises during the time in question.

Defendant's Counsel: Yes.

Q. What is the business of Wallerstein Textiles?

A. Converters of fabrics, lastex fabrics.

Q. And they have been in that business ever since you have been with them?

A. Yes.

Q. Is it not a fact, Miss Daych, that Wallerstein purchases green goods from the mills?

A. That is right.

Defendant's Counsel: Your Honor, I object to this line. The witness has not been asked her capacity with the company as yet.

The Court: Sustained.

Q. What is your——

A. I am a bookkeeper.

Q. Are you personally acquainted with the purchases made by Wallerstein Textiles?

A. I am.

[fol. 49] Q. And they purchase green goods from mills?

A. They do.

Q. Outside of the State of New York?

Defendant's Counsel: I object to that. I do not think, as a bookkeeper, she is competent to answer that.

By the Court:

Q. According to the books, do the books show that?

A. Yes.

By Plaintiff's Counsel:

Q. Is that correct, Miss Daych?

A. Yes, sir.

Q. Mills outside of the State of New York?

A. Yes, sir.

Q. And then you ship merchandise to dyers?

A. That is rght.

Defendant's Counsel: I object to that. Counsel is leading.

The Court: Sustained.

Q. What happens to the goods after you purchase them from the mills?

A. We have them finished by various bleacheries.

Q. A lot of them are outside of the State of New York?

A. Most of them are outside of the State of New York.

Q. After the goods are bleached outside of the State of New York, what happens to them?

A. Some of them are shipped directly from the bleachery to the customer and some of them are shipped to our office in New York City.

Q. You also have a loft?

[fol. 50] A. We have shipping space and they are shipped to various customers from our end.

Q. Shipped to customers outside of the State of New York?

A. Yes.

Q. Regularly and continuously?

A. Yes, sir.

Q. And a substantial portion of the shipments are made to customers outside of the State of New York?

A. They are, yes, sir.

Q. You handle the goods physically there?

A. Yes.

Q. You cut them sometimes?

A. Very seldom, for sample pieces.

Q. And the shipments made from the bleacheries are made to customers outside of the State of New York?

A. Yes, sir.

Q. Regularly and continuously?

A. Yes, sir.

Q. And the amount of shipments you have made during that time to customers outside of the State of New York run into thousands and thousands of dollars each month?

A. There were.

Q. From your office at New York and from the bleacheries.

A. Yes.

Defendant's Counsel: No questions.

FREDERICK DAVIS, 190 Linden Street, Rockville Center, Long Island, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Davis, you are connected with the Brooklyn Savings Bank, are you not?

A. I am.

Q. And had been back in November of 1938?

A. I was.

[fol. 51] Q. In what capacity, sir?

A. Real estate supervisor.

Q. And you are acquainted with the building at 443 Fourth Avenue?

A. I am.

Q. Do you have the records of employment of this plaintiff with you in your possession?

A. Yes, sir.

Q. Will you please look at those records? By the way, Mr. Davis, you are the man I examined before trial last week some time?

A. That is right.

Q. In behalf of the bank?

A. That's right.

Q. Mr. Davis, you remember the time you gave Mr. O'Neil his check for $423, do you not?

A. Yes, I do.

Q. You are acquainted with the Kirshbaum decision by the Supreme Court?

A. I know there has been a decision by the Supreme Court.

Q. And the Walling decision by the Supreme Court?

By the Court:

Q. You are not an attorney?

A. Not an attorney.

The Court: What is the use of asking him?

By Plaintiff's Counsel:

Q. Did you figure out the amount, Mr. Davis, that would be due this man in the event he were covered by the act?

A. No.

Q. Did anybody in the bank?

A. Some of them were figured.

[fol. 52] Q. Was Mr. O'Neil's?

A. I am not sure of that.

Q. Will you look at your records and see?

A. Records of payroll sheets.

Q. You wouldn't have any records?

A. I have no records indicating what Mr. O'Neil, the figures arrived at.

Q. Do you know how to figure these things out?

A. After a fashion.

Defendant's Counsel: I advised counsel to make any evidence available at the trial if he wished. He said, "Will you bring certain papers?" I said, "Any papers you will subpoena we will be glad to bring." He did not subpoena

Mr. Davis or the papers. He wishes to examine Mr. Davis, who has not refreshed his recollection from the papers.

The Court: What is the concession you want?

Plaintiff's Counsel: Assuming that the Court determines that this man, as a result of his employment at 443 Fourth Avenue, for the time at issue, assuming that his employment was such as to be covered by the Fair Labor Standards Act of 1938, would you agree, Mr. Snedeker, that the amount of such overtime earned by this plaintiff was the sum of $423.16?

Defendant's Counsel: No, I would have to see that. That is the most substantial fact at issue in the case.

The Court: The Court will determine that, Counsel.

[fol. 53] MOTION TO DISMISS DEFENSES CONTAINED IN ANSWER

Plaintiff's Counsel: That's all. Plaintiff rests. At this time, I move to dismiss those defenses in the answer of this action marked "First separate and complete defense" and "Second and Partial Defense," on the ground that they are legally insufficient.

The Court: Decision reserved on the motion.

MOTION TO DISMISS COMPLAINT

Defendant's Counsel: I'd like to make a motion at this time at the completion of the plaintiff's case, that the plaintiff has failed to sustain the burden of proof here. And I respectfully move that the complaint be dismissed, as to sufficiency. All of the tenants who have testified—they were never asked during what period they were tenants in possession. I was asked to concede that they were tenants for portions of the period, but I think if your Honor reviews the evidence you will find that a substantial number of these witnesses never testified during what period of plaintiff's employment they were in possession. Obviously, the character of the tenancies from time to time during the employment would affect whether the employee or the building was engaged in interstate commerce. As to some of the tenants, there was no testimony as to the space that they occupied during the period.

The Court: Decision reserved on the motion.

[fol. 54] FREDERICK DAVIS, now called as a witness in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination by Defendant's Counsel:

Q. Mr. Davis, on November 13, 1942, did Mr. William O'Neil, the plaintiff in this action, call at the bank?

A. He did.

Q. Did you have a conversation with Mr. O'Neil?

A. I did.

Q. Did you explain to him the purpose——

Plaintiff's Counsel: He is leading the witness.

The Court: You did, a great deal.

Defendant's Counsel: Question withdrawn.

Q. Did you explain to Mr. O'Neil that he might have a possible claim under the Act in this case? Let me ask you this: What did you say to Mr. O'Neil when he called at the office that morning?

A. When Mr. O'Neil came in, he came in, said he heard a number of people were obtaining moneys on the Wage and Hour Law, and he came in to see if he was entitled to any himself. I answered we figured we could give him some money. We could figure it out to give him some money; to stop any possible chance later on of a claim, we would figure out and give him a flat amount of compensation and overtime.

Q. And did you explain to Mr. O'Neil that in paying the sum to him at that time he agreed to release the bank from any possible liability for unpaid overtime compensation in the event he would consider——

[fol. 55] Plaintiff's Counsel: He is putting conversation in his mouth.

A. I stated, in order to obtain any moneys it would be necessary for him to sign certain papers and in this case, as in all cases, I explained the nature of the paper that would have to be signed.

Q. And did Mr. William O'Neil sign a certain release in your presence at that time?

A. He did.

Plaintiff's Counsel: I will concede that is the release he signed.

Defendant's Counsel: I offer in evidence this release. This is the release which we plead by way of a complete defense to the action.

(Release received and marked Defendant's Exhibit "A" in evidence.)

Defendant's Counsel: Does the plaintiff concede that that is Mr. O'Neil's signature?

Plaintiff's Counsel: Yes.

Defendant's Counsel: Does counsel concede that the contents of this is the same as the defense? I do not think it is necessary to do that.

Plaintiff's Counsel: It is in the answer.

Q. (Showing witness paper.) Is that the instrument which was signed at that time by Mr. O'Neil?

A. It was.

Q. Did he also sign at that time an affidavit on the back as to his citizenship?

A. He did.

[fol. 56] Q. Is that the affidavit signed by Mr. O'Neil?

A. That is the one.

Q. Is that your signature on the release?

A. My signature on the release as a witness.

Q. Now, Mr. Davis, is it a fact that it was the purpose of the bank to keep this building——

Plaintiff's Counsel: I object to that.

Q. Mr. Davis, what was the policy of the bank as far as the type of building they tried to keep? Did the bank make any effort to keep this building—to keep out of this building tenants who were engaged in manufacturing?

Plaintiff's Counsel: I object to that.

The Court: Overruled.

A. We made an attempt. In fact, we put one tenant out who was doing manufacturing. We classified it as showroom and office building entirely. We even submitted leases to the tenants as office building leases.

Q. Mr. Davis, did a large percentage of the leases in this building contain a clause which permitted the landlord to terminate the lease if the tenant engaged in manufacturing?

Plaintiff's Counsel: I object to that, if the Court please. That has no relevancy to the issues at bar.

The Court: That will be taken into consideration. Objection overruled.

A. The usual clause is if a tenant defaults in any of the covenants or conditions of the lease, he may receive notice at the option of the landlord, and his lease terminated and the tenant vacate.

[fol. 57] Q. Mr. Davis, you examined all the leases, did you, in connection with this building during this period of time?

A. I practically examined every one and put my signature on them as subscribing witness for the bank.

Q. When I say recently—in the last day or so you have checked over the leases?

A. I have checked over the leases in the last day or so.

Q. Did you read them with particular attention to the clause in the leases, that is, type of business that was to be conducted by the tenant in the premises?

Plaintiff's Counsel: I object to that.

The Court: Overruled.

A. I did check the leases and find that it is the real estate board form of lease. Therefore, I knew the clause was in it. I checked in most cases and found out the type of business the firm was to do, it had agreed to do in making the lease.

Q. In making this inspection of all leases covering this period, did you find any of them where the specific permission to manufacture on the premises was given?

A. Where specific——

Q. Generally, what were the purposes, what was the type of business which was permitted under these leases?

Plaintiff's Counsel: I object. This man is not a lawyer. He asks him to interpret leases.

A. The majority leases read "executive offices, salesrooms, showrooms," in connection with tenant's business, that was the general makeup of the term, of the tenant's business.

[fol. 58] Defendant's Counsel: Your Honor, I do not want to go through the trouble of having Mr. Davis testify

to all these, but since I have made concessions innumerable to my opponent—however, if he forces me to do so—my purpose of offering the leases here is to show, and I think they will show, that none of the tenants were given the privilege of carrying on any businesses, of doing any manufacturing whatsoever on the premises, and the leases contained specific provisions entitling the landlord to terminate the lease if there is any manufacturing conducted on the premises.

By the Court:

Q. That is correct, is it?

A. That is correct.

Defendant's Counsel: I offer these in evidence.

The Court: You may, if you wish, but we have his testimony.

By Defendant's Counsel:

Q. Mr. Davis, is it a fact, that after the, that at the present time this building, August 30, 1940, roughly three years ago—it is true that at the present time, that the nature of the business in the building has changed?

Plaintiff's Counsel: I do not see that has any bearing.

The Court: Since when?

Defendant's Counsel: The plaintiff's hiring ceased in August, 1940. What I am seeking to prove here is that [fol. 59] these witnesses who have been called to court to testify as to the nature of the business are obviously testifying as to the present condition of the business.

Q. Mr. Davis, isn't it a fact that whereas at the present time, isn't it a fact that—I think I will let it go, your Honor.

By the Court:

Q. Has the character of the business changed in recent years? If so, about when?

A. We had a number of vacancies in the building from time to time because we are trying to run or operate a non-manufacturing building. In 1942, we decided we could do better if we changed it over to manufacturing, which we did.

Defendant's Counsel: Your Honor, my opponent has subpoenaed a small percentage of the tenants in this building.

Plaintiff's Counsel: That is a question of opinion.

By Defendant's Counsel:

Q. Mr. Davis, will you tell me how many tenants there were in this building during the period of the plaintiff's employment?

A. About twenty tenants in the building.

By Plaintiff's Counsel:

Q. How many?

A. Approximately twenty tenants in the building.

[fol. 60] By Defendant's Counsel:

Q. There were more than that?

Plaintiff's Counsel: Just one moment now.

Q. Have you a list of the tenants that we gave to Mr. Simon at the examination before trial?

Defendant's Counsel: By the way, Mr. Simon, can I have a copy of the examination which you never served on me?

Plaintiff's Counsel: Yes.

Q. Have you got a typewritten list of the tenants in the building we gave to——

Defendant's Counsel: Will you concede there are 27 tenants in the building there?

A. Some of those tenants were in and out and space was taken by other people. You asked the question, approximately how many tenants were in the building at any one time. I will say about 20 tenants were in the building during a given period. Leases given to the attorney for the plaintiff showed more tenants, but it is because two or three of the locations had been occupied during that particular time by more than one tenant.

Defendant's Counsel: Will counsel concede those are leases of the building for the premises?

Plaintiff's Counsel: I would have to know the reason.

Defendant's Counsel: You have offered testimony as to [fol. 61] the nature of the business of some of the tenants. I wanted the Court to know the nature of the business of the remainder.

The Court: Offer them all in evidence. Then we have his testimony to support that.

Defendant's Counsel: May I do that, your Honor?

The Court: Yes, surely.

By the Court:

Q. Do you know how many there are in the bundle?

A. No, sir; I do not.

Defendant's Counsel: My only point in offering these in evidence is to show that under the purpose clause of this lease, a tenant was to occupy the building and was to store goods, and none of them granted the tenant the right to manufacture on the premises.

The Court: That is all right. That is to support his testimony.

Defendant's Counsel: Yes, sir.

By Defendant's Counsel:

Q. Mr. Davis, when Mr. O'Neil called at the bank did you read the release through to him that you handed him for his signature?

A. I showed him the release and told him its contents. I did not read it. I made it plain to him.

Q. What——

Plaintiff's Counsel: I object to that.

The Court: Overruled.

[fol. 62] Q. What did you say to him?

A. I explained contents of the paper he was to sign, stating it was to cover overtime and costs or anything arising out of his employment.

(Forty-seven (approximately) leases received and marked Defendant's Exhibit "B" in evidence.)

Cross-examination.

By Plaintiff's Counsel:

Q. When you mentioned 20 tenants, Mr. Davis, you were aware of the fact, were you not, that the Herman Furniture Company occupied four floors?

A. The Herman Furniture Company occupied three floors and basement.

Q. Of an eleven-story building?

A. Yes, sir.

Q. In other words, they occupied practically one-half of the building?

A. No, I wouldn't say four into eleven is one-half of the building.

Q. Steinberg Bros. had a whole floor?

A. They did.

Q. Dodd, Mead had a whole floor?

A. They did.

Q. You say you permitted no manufacturing at all in that building during the time in question in this case?

A. That is right.

Q. Did you ever go to those premises, visit the premises?

A. Sometimes twice a week, sometimes once a week.

Q. Did you ever go into Steinberg Bros.?

A. I have been in Steinberg's.

Q. Did you ever hear a machine going?

A. Best of my recollection, Steinberg had a little sewing machine down in the corner of their stockroom.

Q. Did you ever see it working?

A. I would not say I recall it working.

[fol. 63] Q. Never once?

A. I do not recall it ever working.

Q. They had a whole floor, glove manufacturers, and all that they had was one machine in the corner?

A. That is possible.

Q. That is a fact, according to your testimony?

A. That is all I recall, the machine in the corner of this stockroom.

Q. Do you remember Fuchs?

A. I do not recall Fuchs.

Q. Never in there?

A. I do not recall going in Fuchs's.

Q. But you remember those firms which did not manufacture?

A. Which did?

Q. Did not.

A. Which did not manufacture?

Q. Yes. In other words, Mr. Davis—I will withdraw that. Were you ever in the premises of Herman Furniture Company?

A. Yes.

Q. Did you ever see them finish up the furniture?

A. I believe they had a man down in the basement who did finish it, to take dirt and dust out of it.

Q. That is all?

A. That is all I recall?

Q. Did you ever see furniture in the raw?

A. I have seen it; it was made into furniture.

Q. Did you ever see it at Herman's before it was made into furniture?

A. I never saw any unpainted furniture, unvarnished.

Q. If you knew they were finishing any merchandise or assembling furniture, you would have had them evicted?

A. I do not consider that manufacturing.

Q. If you knew Steinberg was manufacturing, you would have evicted them?

A. I do not consider manufacturing anything Steinberg might have done on that one machine.

[fol. 64] And Fuchs—have you ever been in there at all?

A. I may have been in Fuchs's.

Q. Did you hear the girl testify that they made thousands of pairs of gloves a month?

A. On the premises?

Q. Yes.

A. I heard her testimony.

Q. But you never saw any manufacturing going on in there three years?

A. I cannot dispute her.

Q. Will you agree that they did manufacturing?

A. I will not agree to that.

Q. If you knew, you would have had them evicted?

A. I do not say we would have had them evicted.

Q. Is that a violation of one of the clauses of that lease?

A. We would have had a right at the landlord's option.

Q. Let's get down to the release. This man came into your premises. He told you he heard some of the men were getting paid, correct?

A. Right.

Q. That release was already drawn up at the time he came in, was it not?

A. No, I draw the release.

Q. Form release?

A. It was a form release, yes, sir.

Q. You notice in that release it says, "Whereas, there is a question between the parties as to the amount of hours worked by the plaintiff," was there any such question?

A. There was a question as to his right.

Q. Was there a dispute between you and Mr. O'Neil as to the amount of overtime hours he worked?

A. There was a discussion.

Q. Yes or no, Mr. Davis.

A. It could not be determined whether he had a right to the money or not.

[fol. 65] Plaintiff's Counsel: I move to strike it out.

The Court: Denied.

Q. At the time you had this conversation with Mr. O'Neil, did you explain to him that besides the overtime compensation he also had coming to him an additional similar amount for liquidated damages?

A. I explained to him——

Q. Yes or no, Mr. Davis.

A. It cannot be answered yes or no.

Q. Did you say one word during that entire conversation to indicate to Mr. O'Neil that if he had a valid claim, he could also collect an additional amount for liquidated damages besides the overtime compensation?

A. I explained to him this was a payment to be made to cover everything arising out of his employment.

By the Court:

Q. All claims that he might have?

A. Yes, sir.

Plaintiff's Counsel: That's all.

Redirect examination.

By Defendant's Counsel:

Q. In other words, Mr. Davis, you characterized to the plaintiff in this action what the release contained, what it covered, is that correct?

A. I did.

Q. You made no effort to conceal from him what his rights were in the matter, did you?

A. I told him that we did not want him to sign anything that we did not explain to him, therefore I explained the [fol. 66] importance of the paper that he was signing.

Defendant's Counsel: Defendant rests.

WILLIAM J. O'NEIL, plaintiff, recalled as a witness in rebuttal in his own behalf, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. You heard Mr. Davis's testimony, did you not?
A. Yes, sir.
Q. When you came up to get that check, was there any discussion as he described?
A. There was, about my citizenship status. Otherwise, there was no discussion.
Q. Did he say anything to you that this is a general release, that you are releasing and waiving all your claims?
A. No, sir.
Q. Did he say anything to you about an item as liquidated damages?
A. No, sir.

Plaintiff's Counsel: That's all.
Defendant's Counsel: That is all.
Plaintiff's Counsel: Plaintiff rests.
The Court: The motions are renewed?

MOTION TO DISMISS COMPLAINT

Defendant's Counsel: Yes, sir. Your Honor, I respectfully renew my motion for a dismissal of the complaint upon the ground that the plaintiff has failed to establish facts sufficient to constitute a cause of action and also that the complaint be dismissed for the reason that the plaintiff released any claim for liquidated damages or counsel fees.

[fol. 67] DECISIONS ON MOTIONS

The Court: Decision reserved on the motion. Decision reserved on the case.
The Court: Plaintiff's motions denied. Defendant's motions granted.
Case closed.

DEFENDANT'S EXHIBIT A

Release signed by plaintiff.

(Omitted pursuant to stipulation.)

DEFENDANT'S EXHIBIT B

Approximately forty-seven leases.

(Omitted pursuant to stipulation.)

[fol. 68] IN SUPREME COURT OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

WILLIAM J. O'NEIL, Plaintiff-Appellant,

against

BROOKLYN SAVINGS BANK, Defendant-Respondent

STIPULATION RE EXHIBITS

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the exhibits in this case be submitted to the Court upon the argument or submission of this appeal in lieu of setting forth typewritten copies thereof in the within case on appeal.

Dated, New York, April 14th, 1943.

Stein, Solomon & Simon, Attorneys for Plaintiff-Appellant. Snedeker & Snedeker, Attorneys for Defendant-Respondent.

[fol. 69] IN SUPREME COURT OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

WILLIAM J. O'NEIL, Plaintiff-Appellant,

against

BROOKLYN SAVINGS BANK, Defendant-Respondent

AFFIDAVIT OF NO OPINION

STATE, CITY AND COUNTY OF NEW YORK, ss.:

MAX R. SIMON, being duly sworn, deposes and says:

I am a member of the firm of Stein, Solomon & Simon, and am fully familiar with all the proceedings had herein.

That this cause was tried, without a jury, on the 15th day of March, 1943 before the Hon. William T. Keleher.

A decision, dismissing the complaint and ordering judgment for defendant-respondent was rendered on the 15th day of March, 1943.

That no opinion was handed down by the trial court.

Max R. Simon.

Sworn to before me this 13th day of April, 1943.
Jose M. Cuyar, Commissioner of Deeds.

[fol. 70] In Supreme Court of New York, Appellate Term, First Department

William J. O'Neil, Plaintiff-Appellant,

against

Brooklyn Savings Bank, Defendant-Respondent

Stipulation Waiving Certification and Settlement to Appellate Term

It Is Hereby Stipulated and Agreed that the foregoing, being all the papers upon which the judgment appealed from herein was entered, have all been filed in the office of the Clerk of the Municipal Court, Borough of Manhattan, First District, and are true copies of the summons, complaint, answer, decision, judgment, notice of appeal and stenographer's minutes herein, and that certification hereof by the Clerk is hereby waived and that consent is hereby given to the settlement of the within case on appeal without further notice.

Dated, New York, April 14, 1943.

Stein, Solomon & Simon, Attorneys for Plaintiff-Appellant. Snedeker & Snedeker, Attorneys for Defendant-Respondent.

[fol. 71] In Municipal Court of the City of New York, Borough of Manhattan, First District

William J. O'Neil, Plaintiff-Respondent,

against

Brooklyn Savings Bank, Defendant-Appellant

Notice of Appeal to Appellate Division

Sirs:

Please Take Notice that pursuant to the leave granted by the Appellate Term of the Supreme Court for the First Department in the above entitled action by an order duly made and filed in the office of the Clerk of that Court on July 7th, 1943 the above-named defendant hereby appeals to the Appellate Division of the Supreme Court First Department from the determination and order of the Appellate Term of the Supreme Court First Department entered herein in the office of the Clerk of the County of New York, on or about the 10th day of June, 1943, whereby it was adjudged that the judgment of the Municipal Court of the City of New York, Borough of Manhattan First District dismissing the complaint herein and awarding costs to the defendant in the sum of $41.00 be reversed with $30 costs to the plaintiff and directing judgment in favor of the plaintiff for $623.16 with interest on $423.16 from August 30th, 1940 and costs; and that said defendant appeals from each [fol. 72] and every part of said determination and order of the Appellate Term as well as from the whole thereof.

Please Also Take Notice that the defendant appeals and will bring up for review an order or judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District dated June 16th, 1943, and entered and filed in the office of the Clerk of said Court on said day, whereby it was adjudged that the plaintiff William J. O'Neil recover of the defendant Brooklyn Savings Bank the sum of $623.16 with interest of $70.89, making a total of $694.05, together with the sum of $115.50 costs and disbursements amounting in all to the sum of $809.55, and that the plaintiff have execution therefor, and from each

and every part of said order or judgment as well as from the whole thereof.

Dated, Brooklyn, New York, August 4th, 1943.

Yours &c., Snedeker & Snedeker, Attorneys for Defendant-Appellant, Office and P. O. Address, 164 Montague Street, Brooklyn, New York.

To: Stein, Solomon & Simon, Esqs., Attorneys for Plaintiff-Respondent, Office and P. O. Address, 225 West 34th Street, Borough of Manhattan, City of New York.

[fol. 73] In Supreme Court of New York, Appellate Term, First Department

11126/1943

William J. O'Neil, Plaintiff-Appellant,

against

Brooklyn Savings Bank, Defendant-Respondent

Order Granting Leave to Appeal to Appellate Division —Filed July 6, 1943

Present: Hon. Bernard L. Shientag, Hon. Charles B. McLaughlin, Hon. William C. Hecht, Jr.

The above named defendant having by notice of motion dated the 24th day of June 1943, moved for leave to appeal to the Appellate Division, 1st Department, from the determination of the Appellate Term,

Now upon reading and filing said notice of motion and the affidavit of Sedgwick Snedeker, verified the 24th day of June 1943, in favor of said motion and the affidavit of Max R. Simon, verified the 28th day of June, 1943, in opposition thereto,

[fol. 74] It Is Ordered that said motion be and the same hereby is granted.

Enter:

W. C. H., Jr., Justice, Appellate Term, Supreme Court, First Dept.

Filed July 7, 1943,

N. Y. County Clerk's Office.

In Supreme Court of New York, Appellate Term, First Department

11126—1943. May #62 MC.

William J. O'Neil, Plaintiff-Appellant,

vs.

Brooklyn Savings Bank, Defendant-Respondent

Present: Hon. Bernard L. Shientag, Hon. Charles B. McLaughlin, Hon. William C. Hecht, Jr., Justices.

Order of Reversal—Filed June 10, 1943

An appeal having been taken to this court by plaintiff [fol. 75] from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, 1st District, entered on the 16th day of March 1943, and the said appeal having been heard and due deliberation having been had thereon,

It Is Ordered and Adjudged that the judgment so appealed from be and the same is hereby reversed, with $30 costs, and judgment directed in favor of plaintiff for $623.16 with interest on $423.16 from August 30, 1940, and costs.

Enter:

B. L. S., Justice, Appellate Term, Supreme Court, First Dept.

[File endorsement omitted.]

[fol. 76] IN MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

Index No. 1625—1943.

WILLIAM J. O'NEIL, Plaintiff,

against

BROOKLYN SAVINGS BANK, Defendant

JUDGMENT OF REVERSAL

Amount of judgment after trial as ordered and adjudged by the Appellate Term—First Department		$623.16
Interest on the sum of $423.16 from August 30th, 1940		70.89
	Total	$694.05
Costs on Reversal	$30.00	
Subpoena fees (8 subpoenas)	4.00	
Filing of Notice of Appeal	2.00	
Stenographer's Minutes	35.00	
Costs by Statute	40.00	
Service of Summons and Complaint	1.50	
Filing of Summons and Complaint	2.00	
Execution to Marshal	1.00	
		115.50
		$809.55

[fol. 77] STATE OF NEW YORK, CITY OF NEW YORK, County of New York, ss.:

MAX R. SIMON, being duly sworn, deposes and says that he is a member of the firm of Stein, Solomon & Simon, attorneys for the plaintiff in the above entitled action. That the disbursements above specified have been made in said action, and in the appeal heretofore taken herein by said plaintiff to the Appellate Term of the Supreme Court, First Department, or will necessarily be made or incurred therein; that a decision had been originally rendered after trial in favor of the defendant, but that the judgment based on said decision has been reversed, with $30.00 costs, by

the Appellate Term, First Department and judgment directed in favor of the plaintiff for $623.16 with interest on the sum of $423.16 from August 30th, 1940, and costs.

Max R. Simon.

Sworn to before me this 12th day of June, 1943. Jose M. Cuyar, Commissioner of deeds.

[fol. 78] Judgment entered the 16th day of June, 1943.

The summons and complaint in this action have been personally served on the Brooklyn Savings Bank, the defendant therein, on the 6th day of February, 1943, and a judgment entered herein on the 16th day of March, 1943, in favor of the defendant against the plaintiff after trial held on the 15th day of March, 1943, dismissing the complaint herein and awarding costs to the defendant in the sum of $41.00, and the plaintiff having duly appealed from said judgment to the Appellate Term of the Supreme Court, First Department, which, by order dated and entered therein the 10th day of June, 1943, ordered and adjudged that said judgment be reversed with $30.00 costs, and that judgment be directed herein in favor of plaintiff for $623.16 with interest on $423.16 from August 30th, 1940, and costs.

Now, on motion of Stein, Solomon and Simon, attorneys for the plaintiff, it is adjudged that the plaintiff, William J. O'Neil, do recover of the defendant, Brooklyn Savings Bank, the sum of $623.16 with interest of $70.89, making a total of $694.05, together with the sum of $115.50 costs and disbursements, amounting in all to the sum of $809.55, and that the plaintiff have execution therefor.

Robert Duffy, Clerk.

[fol. 79] IN SUPREME COURT OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

#62 MC

May, 1943

WILLIAM J. O'NEIL, Plaintiff-Appellant,

v.

BROOKLYN SAVINGS BANK, Defendant-Respondent

Present: Hon. Bernard L. Shientag, Hon. Charles B. McLaughlin, Hon. William C. Hecht, Jr., Justices.

Appeal by plaintiff from judgment of the Municipal Court of the City of New York, Borough of Manhattan, 1st District, entered upon decision of justice in favor of defendant.

Stein, Solomon & Simon (Max R. Simon, of counsel) for appellant. Snedeker & Snedeker (Sedgwick Snedeker, of counsel) for respondent.

PER CURIAM:

The proofs show that plaintiff was employed in the production of goods for commerce within the meaning of [fol. 80] the Fair Labor and Standards Act, and entitled to recover liquidated damages in the sum of $423.16 by reason of defendant's default in making overtime payments as directed therein. The sum of $200 is fixed as a reasonable attorney's fee.

Judgment reversed, with $30 costs, and judgment directed in favor of plaintiff for $623.16 with interest on $423.16 from August 30, 1940, and costs.

All concur.

Filed.

[fol. 81] In Supreme Court of New York, Appellate Division—First Department

William J. O'Neil, Plaintiff-Respondent,

against

Brooklyn Savings Bank, Defendant-Appellant

Stipulation as to Exhibits

It is hereby stipulated and agreed that defendant's exhibits A, release signed by plaintiff and B, approximately forty-seven leases, which were received and marked in evidence on the trial of this action be and the same are hereby omitted from the printed record and that a statement be printed in lieu thereof.

Dated, New York, October 5, 1943.

Snedeker & Snedeker, Attorneys for Defendant-Appellant. Max R. Simon, Attorney for Plaintiff-Respondent.

[fol. 82] Stipulation Waiving Certification to Appellate Division

[Same Title]

It is hereby stipulated and agreed by and between the attorneys for the respective parites hereto that the foregoing are true and correct copies of the Record on Appeal to the Appellate Term, First Department; the Order of Reversal; the Judgment of Reversal and the Notice of Appeal to the Appellate Division, First Department, all of which are on file in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, as well as the Opinion of the Appellate Term, First Department and the order of said Court allowing the appeal, which are on file with the Clerk of said Court.

Certification of all of the foregoing papers is hereby waived.

Dated, New York, October 5, 1943.

Snedeker & Snedeker, Attorneys for Defendant-Appellant. Max R. Simon, Attorney for Plaintiff-Respondent.

[fol. 83] IN MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN—FIRST DISTRICT

1625—1943

[Same Title]

NOTICE OF APPEAL TO COURT OF APPEALS

SIR:

Please take notice that pursuant to leave granted by the Appellate Division of the Supreme Court, First Department, by order dated February 25, 1944 and filed that day in the office of the Clerk of that court, the defendant in the above entitled action hereby appeals to the Court of Appeals of the State of New York from the judgment in the above entitled action in favor of the plaintiff and against the defendant in the sum of $908.83 entered upon the order herein of the Appellate Division of the Supreme Court, First Department in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, on the 8th day of February, 1944 modifying and affirming the final judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District entered in the office of said Clerk on the 16th day of June, 1943 upon the order of reversal of the Supreme Court of the State of New York, Appellate Term, First Department dated June 10, 1943 in favor of the Plaintiff-respondent and against the Defendant-appellant in the sum of $809.55, and the defendant appeals from each and every [fol. 84] part of said judgment of modification and affirmance as well as from the whole thereof.

Dated February 28, 1944.

Snedeker and Snedeker, Attorneys for Defendant-appellant, Office & P. O. Address, 164 Montague Street, Brooklyn, New York.

To Max R. Simon, Esq., Attorney for Plaintiff-respondent, Office & P. O. Address 225 West 34th Street, New York City.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Same Title]

ORDER GRANTING LEAVE TO APPEAL TO COURT OF APPEALS—February 25, 1944

Present Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

The above-named defendant having moved for leave to appeal to the Court of Appeals from the judgment entered [fol. 85] on the order of this Court entered herein on the 11th day of January, 1944, or for a reargument of the appeal herein, and for a stay of all proceedings on the part of the plaintiff under said judgment pending said appeal.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Sedgwick Snedeker in support of said motion, and the affidavit of Max R. Simon in opposition thereto, and after hearing Mr. Sedgwick Snedeker for the motion, and Mr. Max R. Simon opposed.

It is hereby ordered that the said motion for leave to appeal and for a stay be and the same hereby is granted, and this court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

And it is further ordered that the said motion for reargument be and the same is hereby denied.

Enter, F. M.

[fol. 86] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

[Same Title]

ORDER OF MODIFICATION AND AFFIRMANCE, APPEALED FROM—December 21, 1943

An appeal having been taken to this Court by the defendant from a determination of the Supreme Court, Appellate Term, entered on or about the 10th day of June, 1943, reversing a judgment of the Municipal Court of the City

of New York, Borough of Manhattan, First District, in favor of the defendant, and directing judgment in favor of plaintiff; and the said appeal having been argued by Mr. Sedgwick Snedeker, of counsel for the appellant; by Mr. Max R. Simon of counsel for the respondent; and briefs having been filed by Mr. Robert R. Bruce of counsel for Realty Advisory Board on Labor Relations, Incorporated; and by Mr. Joseph V. Lane, Jr., of counsel for the Mutual Life Insurance Company of New York as amici curiae; and due deliberation having been had thereon, it is

Ordered and adjudged that the determination of the Appellate Term and the judgment entered thereon, so appealed from, be and the same hereby are modified, on [fol. 87] the law and facts, by providing that the allowance of $200 as counsel fee be reduced to the sum of $100 for services heretofore rendered herein, in addition to a counsel fee of $50 for services rendered on this appeal; and that the respondent recover of the appellant the costs of this appeal; and that as so modified the said determination and judgment entered thereon be and the same hereby are affirmed.

In Municipal Court of the City of New York, Borough of Manhattan—First District

Index No. 1625—1943

[Same Title]

Judgment

Amount of judgment as modified by order of Appellate Division—First Department		$709.55
Amount awarded by Appellate Division—First Department as attorney's fee for services rendered on appeal thereto	$50.00	
Amount paid for printing respondent's brief and respondent's reply brief in Appellate Division	89.28	
Appeal to Appellate Division before argument	20.00	
Appeal to Appellate Division for argument	40.00	199.28
		$908.83

[fol. 88] STATE OF NEW YORK,
City of New York,
County of New York, ss:

Max R. Simon, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above action. That the disbursements above specified have been made in an appeal that was taken herein by the defendant to the Appellate Division—First Department, or that will necessarily be made or incurred therein; that a judgment in the sum of $809.55 was heretofer entered herein on June 16, 1943 in favor of plaintiff and against the defendant; that the Appellate Division made an order directing that said judgment be reduced and modified to the sum of $709.55, and that, as so reduced and modified, the same be affirmed with costs and wherein it was further directed that plaintiff be awarded the additional sum of $50.00 as a reasonable attorney's fee for services rendered on said appeal to the Appellate Division.

Max R. Simon.

Sworn to before me this 3rd day of February, 1944.
Jose M. Cuyar, Comm. of Deeds, N. Y. C.

Judgment entered the 8th day of February, 1944.

[fol. 89] A judgment having been heretofore duly entered herein on June 16, 1943 in favor of plaintiff and against the defendant in the sum of $809.55,—and the defendant having taken an appeal from said judgment to the Appellate Division—First Department which made an order directing that said judgment be reduced to the sum of $709.55, and that, as so reduced and modified, the same be affirmed with costs, and further directing that the plaintiff be awarded herein the additional sum of $50.00 as a reasonable attorney's fee for services rendered on said appeal.

Now, on motion of Max R. Simon, attorney for the plaintiff, it is

Adjudged, that plaintiff, William J. O'Neil, do recover of the defendant, Brooklyn Savings Bank, the sum of $709.55 together with the sum of $199.28 costs and disbursements, amounting in all to the sum of $908.83, and that the plaintiff have execution therefor.

Albert Sullivan, Clerk.

[fol. 90] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

November, 1943.

Alfred H. Townley, Edward J. Glennon, Irwin Untermyer, Edward S. Dore, Joseph M. Callahan, JJ.

13696

[Same Title]

Appeal by permission of the Appellate Term of the Supreme Court from its determination reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, in favor of defendant, and directing judgment in favor of plaintiff.

Sedgwick Snedeker, of counsel (Snedeker & Snedeker, attorneys) for appellant.

Max R. Simon for respondent.

Robert R. Bruce, of counsel (John J. Boyle with him on the brief; McLanahan, Merritt & Ingraham, attorneys) for Realty Advisory Board on Labor Relations, Incorporated, as amicus curiae.

Joseph V. Lane, Jr., of counsel (Vincent Keane with him on the brief; Louis W. Dawson, attorney) for The Mutual Life Insurance Company of New York, amicus curiae.

OPINION

[fol. 91] *Per Curiam:*

We appreciate that the result of our decision may seem harsh. The harshness, however, is inherent in the legislation and in the decisions which have construed it. As was said in Peter Rigopoulos et al. *v.* Kervan, — U. S. C. C. A., —, "We see no escape from the statutory language."

Under the circumstances of this case, however, especially in view of the small amount involved and that costs will be awarded to the plaintiff, we think a counsel fee of $100 for services heretofore rendered, in addition to a counsel fee of $50 for services rendered on this appeal, is fair and reasonable. The determination of the Appellate Term and the judgment entered thereon should be modified accord-

ingly and, as so modified, affirmed with costs of this appeal, to the respondent.

[fol. 92] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

November, 1943

Alfred H. Townley, Edward J. Glennon, Irwin Untermyer, Edward S. Dore, Joseph M. Callahan, JJ.

13696

[Same Title]

Appeal by permission of the Appellate Term of the Supreme Court from its determination reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, in favor of defendant, and directing judgment in favor of plaintiff.

Sedgwick Snedeker, of counsel (Snedeker & Snedeker, attorneys) for appellant.

Max R. Simon for respondent.

Robert R. Bruce, of counsel (John J. Boyle with him on the brief; McLanahan, Merritt & Ingraham, attorneys) for Realty Advisory Board on Labor Relations, Incorporated, as amicus curiae.

Joseph V. Lane, Jr., of counsel (Vincent Keane with him on the brief; Louis W. Dawson, attorney) for The Mutual Life Insurance Company of New York, amicus curiae.

[fol. 93] CALLAHAN, J. (Dissenting):

Plaintiff was employed as a night watchman in an eleven-story business building located at 443 Fourth Avenue, New York, N. Y., from November 5, 1938, to May 3, 1940. Two years after leaving his employment he met a friend who had been a fellow worker in the building and who told him that one of the defendant's officers wished to see plaintiff as he had a check for him (plaintiff). When plaintiff called on defendant he was told that a check for $423.16 for overtime wages had been waiting for him, but that defendant had been unable to locate plaintiff. The plaintiff accepted the check and signed a general release, after that paper had been explained to him. The release recited that

there was uncertainty as to whether plaintiff had any enforcible claim under the Fair Labor Standards Act, that due, if any, was difficult of ascertainment, and that the parties desired to settle the claim by payment of the sum mentioned.

Concededly the amount paid was the full amount of plaintiff's claim for overtime wages.

Some time after the receipt and acceptance of these wages, plaintiff commenced the present action in the Municipal Court to recover an additional $423.16 for liquidated damages, and an attorney's fee.

Upon the trial of the action in the Municipal Court there was a dispute as to whether the tenants in 443 Fourth Avenue were engaged in producing goods for commerce.

It appeared that there were twenty lofts in the building which had been rented to 27 different tenants during the [fol. 94] period of plaintiff's employment.

Plaintiff called as witnesses employees who testified that nine of these tenants had been engaged in activities which plaintiff claimed showed production of goods for interstate commerce.

Defendant's real estate officer testified that the leases in force during the period of plaintiff's employment provided for the use of the rented space for showroom and office purposes, with covenants against any manufacturing in the premises.

The Municipal Court found in favor of defendant, and dismissed the complaint, thus resolving the disputed issues of fact in defendant's favor. Upon appeal to the Appellate Term, that court reversed the judgment of the Municipal Court, stating that the proof showed that plaintiff was employed in the production of goods for commerce and was, therefore, entitled to recover an additional $423.16 for liquidated damages. It fixed the sum of $200 as a reasonable counsel fee, and adjudged that said sum be paid to the plaintiff.

It thus appears that at the time when the compensation was paid and the release executed, and in fact throughout the present litigation there has been a dispute as to whether the statute (Fair Labor Standards Act, Section 16, subdivision b; 29 U. S. C. A. §216, subdivision b) applied to plaintiff, or afforded him any benefits. This dispute did not involve merely a controversy as to the construction of

the law but involved federal issues as well, concerning the nature of the activities of the tenants occupying space in [fol. 95] the commercial building in which plaintiff worked.

There would seem to be ample consideration for an accord and satisfaction or for a general release, under the circumstances noted. Nevertheless, this court is about to hold that the liquidated damages may be recovered and some attorney's fee must be paid to plaintiff, even though he received his full compensation before suit and gave a general release. The basis of this decision is that the statute and the public policy declared by it prevent any settlement of the claim for liquidated damages. In other words, such damages are collectible because the overtime wages were not paid concurrently with regular wages. This strange and harsh doctrine should not be promulgated unless it is clear that the statute intended such a rule.

The statute in question reads as follows:

"Section 16. Penalties; civil and criminal liability

. . . . . .

(b) Any employer who violates the provisions of section 6 or section 7 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or [fol. 96] employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition, to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

It is to be noted that the section imposes liability for liquidated damages only on an employer who "violates the provisions of section 6 or section 7." Here, the employer has paid the overtime wages to the last penny. It paid the same voluntarily and, in fact, without any prior

demand therefor by the employee. The theory on which plaintiff's claim for the liquidated damages rests is that the courts are to imply a requirement under section 7 that the overtime be paid at the end of each week. Delay of any kind is said to make the payment of liquidated damages mandatory and beyond release, even where no legal action is required for the collection of the overtime compensation. But the section quoted says that an "Action to recover such liability may be maintained," etc. "Such liability" no doubt refers to overtime compensation and liquidated damages. It seems to me, therefore, that the liability for damages only arises when an action has been made necessary to collect the compensation. The statute does not say that it shall be deemed to have been violated if the employer fails to pay the overtime compensation with the regular wages.

It is not contended that an attorney's fee would be collectible where no action was necessary. It would seem likewise the intention that the right to damages was de- [fol. 97] pendent on the necessity for bringing suit.

The question is one of statutory construction, and we are endeavoring to ascertain Congressional intent. The Fair Labor Standards Act was adopted after conflicting bills had been passed by the House and the Senate comprising the Seventy-fifth Congress. A conference committee was thereupon appointed and the conferees prepared the bill which was finally adopted. Neither of the original bills contained any provision similar to Section 16, as found in the final bill. In fact, a provision in one of the original bills forbidding any contract waiving any of the benefits under the law was omitted from the final bill, and Section 16 substituted as a section to aid enforcement.

We may be best enlightened as to the meaning intended by the language found in the final bill by examining the statements of the conferees to Congress as to their purpose in inserting the new section. In explaining Section 16, Representative Keller, one of the conferees, said:

> "If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in

addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fee and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit" (83 Cong. Record, p. 9264).

[fol. 98] Surely, Representative Keller did not understand that employees would have the right to liquidated damages unless they were compelled to sue for their compensation. He did not say that delay of payment was to be the basis for liability, but said that failure to pay and the necessity for suit were to be the conditions creating the penalty. Nothing has been called to our attention from the debates, to show that any member of Congress gave the section a different meaning. If, contrary to the views expressed by Representative Keller, delay in payment is to be substituted for failure of payment and the necessity of suit as the condition creating double liability, surely more apt language could have been found to express that intention. Under the construction now proposed, no employer would be safe unless he decided correctly, and on each current payday the precise amount of compensation due, despite all the conflicting issues that frequently arise affecting such rights.

The difficulty which arises in determining the question as to whether the Fair Labor Standards Act applies to maintenance employees in business buildings may be illustrated by a brief reference to the decisions affecting that question. The courts have determined that the application of the Act depends on the employes' activities (Kirschbaum Co. *v.* Walling, 316 U. S. 517; Warren-Bradshaw Co. *v.* Hall, 317 U. S. 88; Walling *v.* Jacksonville Paper Co., 317 U. S. 564; McLeod *v.* Threlkeld, 319 U. S. 491). But as the Act applies to employees in two categories, i.e., those engaged in commerce, and those engaged in producing goods for commerce (apparently with a broader base for liability in the latter class of employment), a distinc[fol. 99] tion has been made between maintenance employees where the tenants in the buildings are engaged in the first rather than the second category (Kirschbaum Co. *v.* Walling, supra; Stoike *v.* First National Bank, 290 N. Y. 19). This distinction arises because the statutory definition of "production of goods for commerce" covers employees "in any process or occupation necessary to the production

thereof" and thus includes maintenance employees, whereas, in so far as the statute applies to those engaged in commerce, the definition is narrower. As to the latter class, the test appears to be whether they are actually in, or so closely related to, the movement of the commerce as to be part of it (McLeod v. Threlkeld, supra).

Because of the distinction above noted, the employer who maintains a business building has many confusing issues to determine before he can ascertain whether his maintenance employees are covered by the Act. First, he must inquire into the activities of his various tenants and determine whether they are engaged in intrastate or interstate commerce. If in the latter, whether they are engaged directly in such commerce or in producing goods for commerce. In addition, there is the question of the character of the maintenance employee's work and how closely it is related to the tenants' activities, with a different basis for liability where the tenants are producing goods for commerce than in the case where they are in the commerce itself. Tenants may change from month to month, or tenants holding over may change their activities. The employer would not know even now (at least not from any authoritative decisions of the courts) whether liability de-
[fol. 100] pended on the number of tenants who were engaged in one activity or the other and, if so, what percentage was to control. Is there any wonder that the problem presented has been compared to "an attempt to square the circle"? (Kirschbaum Co. *v.* Walling, supra.)

To add to this confusion, as the law is now to be interpreted, all of these conflicting questions must be settled, and settled correctly, on each payday, with a liability for double payment if the employer delays one day to inquire into the facts. If this is the proper construction of the Act, then we may well ponder whether it is one "to help those who toil in factory and on farm" to obtain "a fair day's pay for a fair day's work," as the Presidential Message stated in recommending the legislation, or one to aid litigious clients and their lawyers.

We are told that public policy compels the construction now being laid down. What about the policy of the law which favors settlement of disputes?

It is quite true that the federal courts have held, and we have agreed, that under the Fair Labor Standards Act an employer may not pay his employee less than the full

amount of overtime wages prescribed by the statute without remaining liable for liquidated damages (Seneca Coal & Coke Co. *v.* Lofton, 136 Fed. 2d 359; Certiorari denied October 18, 1943; Campbell *v.* Mandel Auto Parts Corp., 264 App. Div. 701).

It is likewise true that the fact that the employer's problem is perplexing does not warrant a shifting of his burden to the employee (Overnight Motor Co. *v.* Missel, 316 U. S. 572).

[fol. 101] In that case, in upholding the constitutionality of the provision for liquidated damages, the Supreme Court of the United States said that such provision was one for compensation, and not a penalty. There was, however, no holding in that case as to when the liquidated damages accrued or were payable.

I advocate no construction of the statute which would sanction release of the employer from liability for damages where he pays less than the full amount of statutory compensation, nor do I advocate any shifting of the burden presented from the employer to the employee.

The statute has specified no time when the overtime wages must be paid. The intention to permit a reasonable time for payment should be inferred. What is a reasonable time is a relative matter. Accordingly, the employee should be permitted to accept the payment at the time it is offered and waive or release any claim of unreasonable delay.

It is one thing to say an employee may not bargain away his rights to compensation under the Act, and it is quite another to say that he cannot release his right to resort to court for his liquidated damages when his compensation has been paid to him in full. The courts of this State have sanctioned a release by an injured workman of a claim under the Workmen's Compensation Law (O'Brien *v.* Lodi, 246 N. Y. 46), and a waiver of minimum wage legislation (Ryan *v.* City of New York, 177 N. Y. 271; see, however, Campbell *v.* City of New York, 244 N. Y. 317). They have permitted an obligor to waive the benefit of the [fol. 102] right to deficiency judgment (City Bank Farmers Trust Co. *v.* McConnell, 284 N. Y. 686). But now we are about to say, although the Federal courts disagree on the question (Guess *v.* Montague, U. S. Cir. Ct. App. 4th Cir., September 16, 1943; Rigopoulos *v.* Kervan, 47 Fed. Supp.

576 [S. D. N. Y. 1942]), that a workman may not accept his full overtime compensation on any date after a current payday and give acquittance for liquidated damages.

I dissent and vote to reverse the determination and order of the Appellate Term and to affirm the judgment of the Municipal Court.

Glennon, *J.*, concurs.

[fol. 103] In Court of Appeals of New York

William J. O'Neil, Plaintiff-Respondent,

against

Brooklyn Savings Bank, Defendant-Appellant

Stipulation as to Exhibits

It is hereby stipulated and agreed that Plaintiff's Exhibits A, being a release signed by the plaintiff and B, being approximately 47 leases which were received and marked in evidence at the trial of this action be and the same hereby are omitted from this printed record on appeal.

It is further stipulated and agreed that these exhibits may be handed up to the Court at the time of argument or be referred to in briefs of the parties with the same force and effect as if fully incorporated herein.

Dated: New York, N. Y., March 6, 1944.

Snedeker & Snedeker, Attorneys for Defendant-Appellant. Max R. Simon, Attorney for Plaintiff-Respondent.

[fol. 104] Stipulation Waiving Certification of Record to the Court of Appeals

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the record on appeal to the Appellate Division, First Department; the order of modification and affirmance, the judgment, the notice of appeal to the Court of Appeals all of which are on file

in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, the Per Curiam opinion of the Appellate Division, First Department and the dissenting opinion of Mr. Justice Callahan, and the order of said Court allowing the appeal, which are on file with the Clerk of said Court.

Certification of all of the foregoing papers is hereby waived.

Dated: New York, N. Y., March 6, 1944.

Snedeker & Snedeker, Attorneys for Defendant-Appellant. Max R. Simon, Attorney for Plaintiff-Respondent.

[fol. 105] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of June in the year of our Lord one thousand nine hundred and forty-four, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur June 14, 1944.

[fol. 106] WILLIAM J. O'NEIL, Respondent,

against

BROOKLYN SAVINGS BANK, Appellant

Be It Remembered. That on the 7th day of March in the year of our Lord one thousand nine hundred and forty-four, Brooklyn Savings Bank, the appellant in this cause, came hereunto the Court of Appeals, by Snedeker & Snedeker, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And William J. O'Neil, the respondent in said cause, afterwards appeared in said Court of Appeals by Max R. Simon, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 107] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Sedgwick Snedeker, of counsel for the appellant; and by Mr. Max R. Simon of counsel for the respondent; briefs filed by amici curiae; and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs, without prejudice to an application in the trial court for reasonable attorney's fee for services rendered upon an appeal.

We do not pass on the question whether the counsel fee heretofore granted is subject to increase for services rendered upon an appeal.

Two questions involving the construction of the Fair Labor Standards Act of 1938 and a question under the Federal Constitution were duly presented and necessarily passed upon by this Court. The defendant contended:

1. That an action may not be maintained under Section 16 (b) of the Act by an employee solely for the recovery of liquidated damages when it is admitted that all overtime compensation was voluntarily paid in full by the employer prior to the institution of suit.

2. That the release of all further claims and damages under the Fair Labor Standards Act executed by the [fol. 108] employee and delivered to his employer at the time he received payment of all overtime compensation due him under the Act is a good defense to an action subsequently brought by such employee solely to recover liquidated damages.

3. That the imposition of liquidated damages deprives an employer of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

This court held against the defendant on each of these three contentions and unanimously affirmed a judgment in favor of the plaintiff.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Municipal Court of The City of New York there to be proceeded upon according to law.

[fol. 109] Therefore, it is considered that the said judgment be affirmed, with costs, etc., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Municipal Court of The City of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Municipal Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 14, 1944:

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (State of New York, Court of Appeals Seal.)

[fol. 110] At a Special Term, Part II of the Municipal Court of the City of New York, Borough of Manhattan, First District, held in the Court House at No. 8 Reade Street, Borough of Manhattan, City of New York, on the 17th day of August, 1944.

Present: Hon. Charles A. Curtin, Justice.

Index No. 1625/1943

WILLIAM J. O'NEIL, Plaintiff,

against

BROOKLYN SAVINGS BANK, Defendant

ORDER

Upon reading the Remittitur of the Court of Appeals of the State of New York dated June 14, 1944, heretofore filed herein, and the affidavit of Max R. Simon sworn to the 17th day of August, 1944, hereto annexed, and on all the papers and proceedings herein and due deliberation having been had, it is

Ordered that the order of the Court of Appeals of the State of New York dated June 14, 1944, be and the same hereby is made the order of this Court.

Enter

Charles A. Curtin, J. M. C.

[fol. 111] MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

Index No. 1625/1943

WILLIAM J. O'NEIL, Plaintiff,
against
BROOKLYN SAVINGS BANK, Defendant

STATE OF NEW YORK,
County of New York, ss:

Max R. Simon being duly sworn deposes and says: that he is the attorney for the plaintiff herein; that an appeal was heretofore taken by the defendant to the Court of Appeals of the State of New York from a certain judgment heretofore entered herein on February 8, 1944; that by order dated June 14, 1944 the Court of Appeals of the State of New York unanimously affirmed with costs the judgment so appealed from and remitted to this court its order and judgment to be enforced according to law;

Wherefore plaintiff prays for an order making the order of the Court of Appeals of the State of New York the order of this Court.

That no previous application has been made for the relief now sought herein.

Max R. Simon.

Sworn to before me this 17 day of August, 1944.
Morris Rudman, Asst. Clerk, First Dist., Municipal Court, Manhattan.

[fol. 112] MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

Index No. 1625/1943

WILLIAM J. O'NEIL, Plaintiff,
against
BROOKLYN SAVINGS BANK, Defendant

FINAL JUDGMENT

Amount stipulated as a reasonable attorney's fee in the Court of Appeals in accordance with stipulation dated July 31, 1944	$100.00

Appeal to Court of Appeals before argument	$30.00	
Appeal to Court of Appeals for argument	60.00	
Court of Appeals term fees	10.00 (more than one term)	
Amount paid for printing plaintiff's points on appeal (Main brief and reply brief) in Court of Appeals	127.11	
Amount paid for remittitur from Court of Appeals	3.15	
Execution to Marshal	1.00	231.26
Total		$331.26

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Max R. Simon, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above action. That the disbursements above specified have been made [fol. 113] in an appeal that was taken herein by the defendant to the Court of Appeals, or that will necessarily be made or incurred therein; that a judgment in the sum of $809.55 was heretofore entered herein on June 16, 1943 in favor of plaintiff and against the defendant; that the Appellate Division made an order affirming, but modifying, said judgment, and that, as so modified judgment was thereafter duly entered herein on the 8th day of February, 1944, in favor of the plaintiff and against the defendant in the sum of $908.83; that thereafter said defendant appealed from said judgment to the Court of Appeals which, after due deliberation, made an order directing that said judgment be affirmed, with costs; that the Court of Appeals further directed that any application for an attorney's fee in the Court of Appeals be made in the Trial Court and that the respective parties hereto, in lieu of making such an application mutually agreed by stipulation dated July 31, 1944, that the plaintiff be awarded the sum of $100.00 for an attorney's fee in the Court of Appeals. By

order of this Court dated August 17, 1944, the order of the Court of Appeals of the State of New York was made the order of this Court.

Max R. Simon.

Sworn to before me this 17th day of August, 1944.
Morris Rudman, Asst. Clerk, First Dist., Municipal Court, Manhattan.

[fol. 114] Judgment entered the 17th day of August, 1944. A judgment having been heretofore duly entered herein on February 8, 1944 in favor of plaintiff and against the defendant in the sum of $908.88, and the defendant having taken an appeal from said judgment to the Court of Appeals which, after due deliberation, directed and ordered that said judgment be affirmed with costs. And the order of the Court of Appeals of the State of New York having been made the order of this Court by order dated August 17, 1944,

Now on motion of Max R. Simon, attorney for the plaintiff, it is

Adjudged that the judgment heretofore entered herein on February 8, 1944 in favor of the plaintiff and against the defendant in the sum of $908.83 upon the order of the Appellate Division be and the same hereby is affirmed;

Adjudged that the plaintiff William J. O'Neil do recover of the defendant The Brooklyn Savings Bank the sum of $100 as a reasonable attorney's fee for the conduct of the appeal in the Court of Appeals together with the sum of $231.26 costs and disbursements on said appeal amounting in all to the sum of $331.26 and that the plaintiff have execution therefor.

Albert Sullivan, Clerk.

[fol. 115] No. 86122

William J. O'Neil vs. Brooklyn Savings Bank

Index No. 1625, Year 1943

STATE OF NEW YORK,
City of New York,
County of N. Y., ss:

I, Albert Sullivan, Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, do certify that I have compared the preceding with the original record on appeal to Court of Appeals and subsequent proceedings in this cause on file in my office and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of this Court this 21 day of August, 1944.

No. of Folios 2240. Fee. $22.40.

Albert Sullivan, Clerk.

B. Salzman (Name of person receiving fee).

(3604)

[fol. 116] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 6, 1944

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted limited to the second question presented by the petition for the writ and the case is transferred to the summary docket. The Solicitor General is invited to file a brief *amicus curiae* if so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 48898 New York, Court of Appeals Term No. 445. Brooklyn Savings Bank, Petitioner, vs. William J. O'Neil. Petition for writ of certiorari and exhibit thereto. Filed September 8, 1944. Term No. 445 O. T. 1944.

FILE COPY

No. 445

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

BROOKLYN SAVINGS BANK,

Petitioner,

v.

WILLIAM J. O'NEIL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HOMER CUMMINGS,
SEDGWICK SNEDEKER,
JOSEPH V. LANE, JR.,
CARL MCFARLAND,
Counsel for Petitioner.

Of Counsel:
SNEDEKER & SNEDEKER,
CUMMINGS & STANLEY.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	5
Reasons for granting the writ	7
1. The state court has decided a substantial question of federal statutory law not heretofore determined by this Court	7
2. The decision below is in conflict with a decision of a circuit court of appeals on the same matter	8
3. The court below has decided a federal question in conflict with the applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision	10
4. There is involved a final judgment by the highest court of a state in a cause in which there is drawn in question the validity of a statute of the United States	14
5. The court below has decided an important question of federal law which should be decided by this Court	17
Appendix	20

CITATIONS.

Cases:

American Machine Co. v. *Kentucky*, 236 U. S. 660	16
Atchison etc. Ry. v. *Nichols*, 264 U. S. 348	12
Birbalas v. *Cuneo Printing Industries*, 140 F. 2d 826	9
Borella v. *Borden Co.*, — F. 2d —, Second Circuit, decided July 28, 1944	17
Brady v. *Daly*, 175 U. S. 148	12
Cecil v. *Gradison* (Ohio), 40 N. E. 2d 958	16

	Page
Champlin Rfg. Co. v. *Commission*, 286 U. S. 210	17
City Bank Farmers Trust Co. v. *McConnell*, 284 N. Y. 686	8
Cline v. *Frink Dairy Co.*, 274 U. S. 445	16
Collins v. *Kentucky*, 234 U. S. 634	16
Connally v. *General Const. Co.*, 269 U. S. 385	17
Cox v. *Lykes Brothers*, 237 N. Y. 376	13
Davis v. *N. Y. Central*, 233 N. Y. 242	8
E. I. S. Mfg. Co. v. *Supco Products Corporation*, 26 F. Supp. 758	13
Eclipse Bicycle Company v. *Farrow*, 199 U. S. 581	4
Fleming v. *Arsenal Bldg. Corporation*, 38 F. Supp. 207, reversed 125 F. 2d 278	15, 16
Fleming v. *Warshawsky & Co.*, 123 F. 2d 622	9
Flynn v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53	13
Gangi v. *D. A. Shulte*, 53 F. Supp. 844	9
Garrett v. *Moore-McCormack Co.*, 317 U. S. 239	13
Guess v. *Montague*, 140 F. 2d 500	8, 10
Hecht Co. v. *Bowles*, 321 U. S. 321	14
Helvering v. *Mitchell*, 303 U. S. 391	12
Higgins v. *Carr Bros. Co.*, 317 U. S. 572	3
Huntington v. *Attrill*, 146 U. S. 657	12
International Harvester Co. v. *Kentucky*, 234 U. S. 216	16
Killingback v. *Garment Center Capital Inc.*, 259 App. Div. 691, appeal denied 248 N. Y. 818	15
Kirschbaum Co. v. *Walling*, 316 U. S. 517	3, 4, 14
Lanzetta v. *New Jersey*, 306 U. S. 451	17
McCulloch v. *Maryland*, 4 Wheat. 316	15
McLeod v. *Threlkeld*, 319 U. S. 491	3
Mellon v. *Goodyear*, 277 U. S. 335	13
Missouri Pacific Railway Co. v. *Humes*, 115 U. S. 512	12
O'Brien v. *Lodi*, 246 N. Y. 41	8
Old Dearborn Co. v. *Seagram Corp.*, 299 U. S. 183	17
Overnight Motor Co. v. *Missel*, 316 U. S. 572	3, 11, 12, 16
Pederson v. *Fitzgerald Construction Co.*, 262 App. Div. 655, affirmed 288 N. Y. 287	15
Radio Corp. v. *Raytheon Co.*, 296 U. S. 459	13
Rigopoulos v. *Kervan*, 47 F. Supp. 576, 140 F. 2d 506	9
Robinson v. *Massachusetts Mutual Life* (Tenn.), 158 S.W. 2d 441	16

Page

Scripps-Howard Radio v. *Comm'n*, 316 U. S. 4 14
Security Adm'r v. *Quaker Oats Co.*, 318 U. S. 218 16
Seneca Coal & Coke Co. v. *Lofton*, 136 F. 2d 359, cert. denied 320 U. S. 772 9
Small Co. v. *American Sugar Ref. Co.*, 267 U. S. 233 6
Stockwell v. *United States*, 13 Wall. 531 12
Tennessee Coal Co. v. *Muscoda Local*, 321 U. S. 590 15
The S. S. Standard, 103 F. 2d 437 ..... 13, 18
United States v. *Cohen Grocery Co.*, 255 U. S. 81 17
United States v. *Harvey Steel Co.*, 196 U. S. 310 4
United States v. *Pennsylvania R. R. Co.*, 242 U. S. 208 16
United States ex rel. Marcus v. *Hess*, 317 U. S. 537 12
Vance v. *Chicago Portrait Co.*, 19 F. 2d 981 4
Walling v. *Belo*, 316 U. S. 624 15
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564 3
Westmoreland Asbestos Co. v. *Johns-Manville Corp.*, 39 F. Supp. 117 13

Statutes and Miscellaneous:

Annual Report of Secretary of Labor, 1941, pp. 147 *et seq* 10

Congressional Record, Vol. 83:

pp. 9176–9177 18
p. 9255 11
p. 9264 11

Constitution, Fifth Amendment 7, 14

Hearings before the Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 2700, 75th Cong., 1st Sess., 1937, p. 54 14

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C.:

Sec. 908(i) 14
Sec. 915(b) 13

Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.*:

Sec. 3(j) 4
Sec. 6 11

Sec. 7 ..... 4, 10, 11
Sec. 7(a) 6, 10
Sec. 11 11
Sec. 13(a) (2) 3
Sec. 14 11
Sec. 15 11
Sec. 16(b) 5, 10, 11
Sec. 17 11
Federal Employers' Liability Act 13
Food Control Act of 1917 16

Seamen's Act, 46 U. S. C.:

Sec. 597 13
Sec. 644 13
Senate Report No. 844, 75th Cong., 1st Sess.; 1937 11
Sherman Act 13
Patent Laws 13

Wage and Hour Manual:

(1940), p. 120 10
(1941), p. 165 10
(1942), p. 729 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

BROOKLYN SAVINGS BANK,

Petitioner,

WILLIAM J. O'NEIL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Your petitioner, Brooklyn Savings Bank, respectfully prays that a writ of certiorari be issued to review the decision and judgment of the Court of Appeals of the State of New York in the above cause of June 14, 1944, and the final judgment entered thereon in the Municipal Court of the City of New York on August 17, 1944.

Opinions Below.

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed the complaint without opinion. The opinion of the Appellate Term (R. 79-80)

is reported at 180 Misc. 542. The majority and dissenting opinions in the Appellate Division, First Department (R. 90-102), are reported at 267 App. Div. 317. The Court of Appeals of the State of New York wrote no opinion.

Jurisdiction.

The Court of Appeals of the State of New York—which is the highest court of the State in which a decision in the suit could be had—issued its remittitur on June 14, 1944 (R. 105). The order of the Municipal Court of the City of New York making the order of the Court of Appeals the order of the Municipal Court of the City of New York was entered on August 17, 1944 (R. 107). The final judgment of the Municipal Court of the City of New York was entered on the same day, August 17, 1944 (R. 110). The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether employees have any right to sue for statutory liquidated damages for non-payment of overtime under the Fair Labor Standards Act where the employer prior thereto has voluntarily paid the full amount of such overtime.

2. Whether upon such payment a release of any such additional liability does not bar recovery of such damages.

3. Whether, because of the admittedly uncertain coverage of the statute, the imposition of such additional liability in such circumstances is not without due process of law.

Statute Involved.

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.*) are set forth in the appendix.

Statement.

Respondent was employed as a night watchman at an eleven-story business building at 443 Fourth Avenue, New York City, from November 5, 1938, to August 30, 1940 (R. 19). Petitioner bank, located in Brooklyn (R. 11, 14), is the owner of the building (R. 5). Respondent's terms of employment were subject to collective bargaining agreements (R. 11).

On June 1, 1942, this Court handed down its decision in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 519, holding that the federal wage and hour act applied to employees at buildings the tenants of which "are principally engaged in the production of goods for interstate commerce." Respondent had left petitioner's employ nearly two years prior thereto (R. 19, 58). Not only were the tenants in the building here involved not engaged in the production of goods for either interstate or intrastate commerce[1] but

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[1] At the trial of the instant case respondent called several employees and one tenant who testified that nine of the twenty-seven tenants of the building (R. 60) dealt in goods which in some part came from outside the state or might be sent beyond the state (R. 25-65). Apart from the lack of qualification of such witnesses to testify as to the nature of the business (R. 27) and their failure to identify the period for which they spoke (R. 53), none of them testified that the tenants were engaged in any actual and substantial production for interstate commerce. There was thus insufficient evidence for coverage either as to goods received or goods sold. As to goods received, the statute applies only to "employees * * * engaged in commerce" rather than necessary to commerce; and the coverage sustained in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 574-575, is inapplicable because it involved a rate clerk of an interstate bus company. Compare *McLeod* v. *Threlkeld*, 319 U. S. 491. There was no evidence of special orders warranting the coverage sustained in the first two situations discussed in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 566-569, but the instant situation falls rather within the third situation there to the effect that "evidence of a wholly general character * * * lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local distribution" (p. 570). *Cf. Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, 574. As to sales, Section 13(a) (2) of the Act expressly exempts from Sec-

the leases also contained covenants against manufacturing (R. 58) which were enforced (R. 56).[2] Nevertheless—because of the stringent penalties of the statute and the uncertainties and cost of litigation (R. 11-12)—petitioner voluntarily calculated respondent's overtime due if the Fair Labor Standards Act were applicable (which came to $423.16) and, without any demand whatever from respondent (R. 25), sought him out and tendered it to him (R. 23). Respondent, without protest (R. 24), accepted the overtime so calculated and in writing released petitioner "from any and all claims, debts, damages, or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment" (R. 11-12, 54-55, 65-66).

Respondent then—without returning the amount so received in settlement (R. 6),[3] without protest to or demand upon petitioner (R. 25), and admitting that the amount of overtime had been correctly calculated in the settlement and fully paid (R. 6)—instituted action in the Municipal Court for the City of New York for the recovery of liquidated damages in an amount equal to the sum he had already been paid ($423.16) plus attorney's fees and interest from the time his employment ceased (R. 7). The trial

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tion 7 "any employee in any retail establishment the greater part of whose selling • • • is in intrastate commerce." In order that respondent be covered by the Act it was necessary—and the case was tried on the theory (R. 25-65)—that he be engaged in an "occupation necessary to the production" (Section 3(j)) "of goods for [interstate] commerce" (Section 7), as this Court held in the *Kirschbaum* case (pp. 524-525).

[2] The leases were introduced (R. 61) and show upon their face that they are the standard form of office lease (R. 56) long in use. It is a matter of common knowledge that union contracts specify different terms and conditions of employment in buildings where manufacturing is permitted. More stringent local health and safety regulations also apply to buildings where manufacturing is permitted.

[3] *Cf. Eclipse Bicycle Company* v. *Farrow*, 109 U. S. 581, 587; *United States* v. *Harvey Steel Co.*, 196 U. S. 310, 315-316; *Vance* v. *Chicago Portrait Co.*, 19 F. 2d 981, 986 (C. C. A. 7, 1927).

court, after hearing the evidence, granted petitioner's motion to dismiss (R. 66-67). The Appellate Term reversed per curiam (R. 79-80; 74-75). The Appellate Division affirmed per curiam (R. 90-91), two justices dissenting (R. 92-102). The Court of Appeals affirmed without opinion (R. 105) and, upon its remittitur (R. 105-107), the Municipal Court made its order (R. 107) and entered the final judgment (R. 108-110).

In these proceedings there were involved both the coverage of the Act, as applied to the building in which respondent served as watchman, and the effect of the accord and satisfaction. Petitioner does not, however, ask this Court to determine the question of coverage because that issue is not of general importance since it is necessarily limited by the nature of the business conducted by the tenants in a particular building during a limited period long past. But, since petitioner as a bank finds itself in the position of the owner of business property, the validity of accord and satisfaction is of general future importance to it and others similarly situated as well as to the public authorities charged with the administration of the Act. The remittitur of the court below (R. 106) certifies that there were presented to it the questions of law which this Court is asked to review.

Specification of Errors to be Urged.

The Court of Appeals of the State of New York erred:

(1) On the first question—

(a) In holding that an action may be maintained under Section 16(b) of the Act by an employee solely for the recovery of liquidated damages when it is admitted that all overtime compensation was voluntarily paid in full by the employer prior to the institution of suit.

(b) In holding that an employer who voluntarily complied with the Act may be subjected to liquidated damages

to the same extent as one who wilfully refused to comply with the Act.

(c) In ignoring the express wording of the statute and the expressed intent of the Conferees, which contemplates only an action for overtime and liquidated damages, and not liquidated damages alone.

(d) In failing to imply the sufficiency of payment within a reasonable time when the statute is silent as to when payments shall be made; in construing the statute so that the condition of liability becomes delay in payment, rather than the express statutory condition of failure of payment; in implying a requirement of immediate payment and thereby producing a harsh result in direct conflict with the expressed Congressional intent; and in holding that the petitioner has violated Section 7(a) of the Act.

(2) On the second question—

(a) In holding that the release of all further claims and damages under the Fair Labor Standards Act, freely executed by the employee and delivered to his employer at the time he received payment of all overtime compensation due him under the Act. is not a good defense to an action subsequently brought by such employee solely to recover liquidated damages.

(b) In refusing to permit compromise of the employee's claim for liquidated damages in direct conflict with prior decisions of this and other Courts sanctioning compromise of penalties, damages, or other liabilities under similar statutes.

(c) In holding that the liquidated damages as distinguished from overtime compensation is so affected with public interest that it may not be released by the employee.

(d) In holding that the employee may not evaluate for himself the damages suffered as a result of the delay in payment where full overtime compensation is paid.

(e) In failing to give effect to the well established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation where the statutory purposes have been fully accomplished.

(f) In permitting the respondent to repudiate the settlement and, while still retaining the benefits received thereunder, to institute suit for the recovery of an additional amount without risking the loss of the benefits derived from the settlement in the event that he fails to establish coverage.

(3) On the third question—

(a) In holding that the imposition of liquidated damages does not deprive an employer of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(b) In holding that the statutory phrase "necessary to the production of goods for [interstate] commerce" is a sufficiently definite mandate upon which to predicate liability for damages of 100% despite prior full and voluntary restitution.

Reasons for Granting the Writ.

1. The state court has decided a substantial question of federal statutory law not heretofore determined by this Court.—While—after the trial court had ruled for petitioner—the state appellate courts ruled for respondent, they did so without statement of reasons and with obvious reluctance. In its per curiam the Appellate Term said only that respondent "was employed in the production of goods for

commerce within the meaning of the Fair Labor Standards Act" (R. 79-80) and the Appellate Division said only that (R. 91)

> We appreciate that the result of our decision may seem harsh. The harshness, however, is inherent in the legislation and in the decisions which have construed it.

The only opinion written was that of the two dissenting justices in the Appellate Division sustaining petitioner's contentions (R. 92-102). Although they wrote no majority opinions, each granted leave to appeal (Appellate Term, R. 73-74; Appellate Division, R. 84-85). The Court of Appeals left the parties where it found them—presumably because the question was one of federal law upon which the decisions of the federal courts were hopelessly at variance. In matters of state law the New York courts recognize no such doctrine as they applied in this case, for they permit the release of claims for the wrongful death of an employee (*Davis* v. *N. Y. Central*, 233 N. Y. 242), for injuries under the Workmen's Compensation Act (*O'Brien* v. *Lodi*, 246 N. Y. 41), and of claims under the deficiency judgment act (*City Bank Farmers Trust Co.* v. *McConnell*, 284 N. Y. 686).

2. The decision below is in conflict with a decision of a circuit court of appeals on the same matter.—The decisions of the state courts and of the lower federal courts are conflicting, on the question here involved, in that some of them give effect to accord and satisfaction in the circumstances here presented while others express a rule rendering settlements ineffective for any purpose under any circumstances. The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Guess* v. *Montague*, 140 F. 2d 500, 504 (1943) and the decision of the United States District Court for the Southern

District of New York in *Gangi* v. *D. A. Shulte*, 53 F. Supp. 844 (1943). In these two cases there were, as in the instant case, a dispute as to coverage of the Act, a voluntary payment prior to the institution of suit of the full amount of overtime due if the Act applied (excluding liquidated damages or attorney's fees), and execution of a release by the employee.

In *Fleming* v. *Warshawsky & Co.*, 123 F. 2d 622 (C. C. A. 7, 1941) the Wage and Hour Administrator had brought an injunction proceeding to force the payment of the amount of overtime due, a consent decree was entered but not honored, the Administrator brought contempt proceedings to force the agreed payments of overtime, and the defendants pleaded full releases; but there had been no payment of the full overtime due, the question was whether employees could release all rights, and liquidated damages and attorney's fees were not involved and could not be involved. In *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359 (C. C. A. 10, 1943), cert. denied 320 U. S. 772, unlike the instant case, there was no release but liquidated damages and attorney's fees were allowed despite voluntary payment without suit. In *Rigopoulos* v. *Kervan*, 140 F. 2d 506 (C. C. A. 2, 1943)—which the Appellate Division below cited in its per curiam for the proposition that there was "no escape from the statutory language" (R. 91)—the court held that there was no evidence of an accord (p. 508). The payments had been forced by injunction proceedings instituted by the Administrator (47 F. Supp. 576). Similarly, in *Birbalas* v. *Cuneo Printing Industries*, 140 F. 2d 826 (C. C. A. 7, 1944), only after the institution of injunction proceedings by the Administrator and the entry of a consent decree did the defendant make the overtime payments; the defendant also took releases of "all liabilities, penalties, actions, or causes of action" under the Act, after which the employees insti-

tuted the action for liquidated damages and attorney's fees; and the court, lamenting "the law's harshness" as compared with the general public policy favoring the settlement of controversies, doubted the correctness of *Guess* v. *Montague* and held that the statute conferred "a single and entire cause of action which can not be discharged or satisfied by paying merely part of it" (p. 828).

3. **The court below has decided a federal question in conflict with the applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.**—The decision below ignores (a) the terms and purpose of the statute, (b) the nature of liquidated damages as defined by this Court, and (c) the general federal law relating to settlements.

(a) The statute places no time limit upon voluntary payments of overtime,[4] obviously contemplates that the liquidated damages shall apply only where employees are forced to litigate to recover overtime,[5] and not only contains no provision against settlements but was purged of such a

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[4] Section 7(a) simply requires the payment of overtime. The Administrator has recognized that, "depending on the circumstances," actual payment may be deferred for substantial periods (*Wage & Hour Manual* (1940), p. 120, (1941), p. 165). Here the overtime was voluntarily and fully paid, without request, and promptly upon intimation of possible coverage. The Administrator has recognized restitution to the extent of the statutory wages due (Annual Report, Secretary of Labor, 1941, pp. 147 *et seq.*).

[5] Section 16(b), under which the instant suit was brought, prescribes liquidated damages and attorney's fees only where an employer has violated Section 7 by failure to pay minimum wages or due overtime. That section provides that the employer "shall be liable" for both overtime due and the liquidated damages, but the immediately following sentence plainly ties such double liability to "an action to recover such liability." The legislative history shows that Representative Keller, a member of the Conference Committee, stated that: "The employees can * * * maintain an action in any court to recover the wages due them and *in such a case* the Court shall allow liquidated damages in addition to the wages due equal to

provision before its adoption.[6] Liquidated damages are not essential rights conferred by the Act for every failure of compliance, as demonstrated by Section 17 which authorizes the Administrator to secure injunctions requiring the compliance only with stated provisions (§17 refers to §15 which in turn refers only to §§6, 7, 11, and 14) omitting Section 16(b) relating to liquidated damages, attorney's fees, and costs. They are similarly omitted from the provision for criminal liability. They are not public but personal rights. That Section 16(b) is said to be "mandatory on the courts, regardless of the good faith of the employer or the reasonableness of his attitude" (*Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 581-582) does not mean that settlements by the parties are

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such deficient payment and shall also allow a reasonable attorney's fee and assess the court costs" (83 Cong. Rec. 9264, emphasis supplied). The provision, as he went on to say, was designed to minimize the cost of enforcement by the Government through placing in the hands of employees "the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the Act" (*id.*). The normal and reasonable reading of the provision is that action may be brought to recover unpaid overtime and, as an incident thereto, liquidated damages as well as attorney's fees and costs. The Administrator has so read it, and refers to the subdivision as one conferring a right of action for overtime "plus" damages, costs, and fees (*Wage & Hour Manual* (1942), p. 729). The Conference Report assumes that liquidated damages may be recovered only where the employee has labored in excess of the maximum hours "without receiving the prescribed payment for overtime" (83 Cong. Rec. 9255). To read the provision as one permitting action for damages *without* overtime is an obvious perversion of language.

[6] There is not the slightest intention in the statute that settlements are prohibited. Indeed, there was eliminated from the measure a provision stating that

> Sec. 20—(b) Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void. (Senate Rep't No. 844, 75th Cong., 1st Sess., 1937.)

So that Congress—certainly to the extent of accord and satisfaction upon the voluntary payment of overtime in full—must have contemplated settlements of liability.

outlawed; for that was said in a case where there was neither payment nor accord and the employee was compelled to litigate his right to overtime.

(b) As defined by this Court liquidated damages in their very nature are personal and designed as compensation for actual damages difficult of proof, rather than as penalty or punishment. *Overnight Motor Co.* v. *Missel, supra,* pp. 583-584. Since the purpose of double damage statutes is to secure adequate "restitution" and to make the injured party "completely whole" (*United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 551-552), no reason appears why such a party may not accept full voluntary restitution and waive damages, fees, and costs at least where—as here—he has not been put to the necessity of making claims or litigating issues. The provisions so waived are purely remedial (*Huntington* v. *Attrill*, 146 U. S. 657, 668 *et seq.*; *cf. Helvering* v. *Mitchell*, 303 U. S. 391, 401); *Stockwell* v. *United States*, 13 Wall. 531, 551, so that the party for whose benefit they exist or who may exercise them needs no authority to waive them where the party liable offers prompt restitution and renders exercise of remedial rights unnecessary. Since multiple damages are designed to be "remunerative" and afford "indemnity for loss" (*Atchison etc. Ry.* v. *Nichols*, 264 U. S. 348, 352; *Stockwell* v. *United States*, *supra*, p. 547), no reason appears why the beneficiary may not waive the excess over a voluntary payment which makes him whole. Since they are provided where damages are difficult to measure and hence conjectural (*Brady* v. *Daly*, 175 U. S. 148, 154; *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, 521, 522-523), the purpose of the law is more exactly met where the parties freely reach an accord and satisfaction.

(c) Multiple damages are provided in many situations under federal law. Settlements have been honored not

only in those cases as to the excess over restitution—as here involved—but also with respect to the basic liability. Seamen—traditionally regarded as the wards of admiralty—may release liability for personal injuries executed—as here (R. 23-25, 54, 65-66)—freely and without coercion or deception. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 246-248; *The S. S. Standard*, 103 F. 2d 437 (CCA 2, 1939). There may be a settlement and release of compensation liability under the Federal Employers' Liability Act. *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53 (per Holmes, J.); *Mellon* v. *Goodyear*, 277 U. S. 335. Upon equitable principles, a release may be effective respecting treble damages under the Sherman Act (*Radio Corp.* v. *Raytheon Co.*, 296 U. S. 459, 462-463) at least unless obtained by deceit, fraud, or trickery (*Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F. Supp. 117 (S. D. N. Y. 1941)). A release will be honored notwithstanding the treble damage right accorded under the patent laws for infringement. *E. I. S. Mfg. Co.* v. *Supco Products Corporation*, 26 F. Supp. 758, 760-761 (S. D. N. Y. 1938).

This being the general state of the law, Congress must be presumed to have legislated with it in mind. As stated in note 6 *supra*, the measure which became the Act here involved was purged of a provision against waivers. Congress has rarely disturbed the general law by legislating expressly upon the subject. Under the Seamen's Act it has required only that releases be executed before a shipping commissioner (46 U. S. C. § 644) and has provided that "any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require" (*id.*, §597). *Cf. Garrett* v. *Moore-McCormack Co.*, *supra*, p. 247; *The S. S. Standard*, *supra*, p. 439; *Cox* v. *Lykes Brothers*, 237 N. Y. 376 (per Cardozo, C. J.). In the Longshoremen's and Harbor Workers' Compensation Act, Congress prohibited waivers of compensation (33

U. S. C. §915(b)) except within limitations and upon official approval (*id.*, §908(i)). As this Court has recently said in another, but somewhat similar, situation: "If Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329; *cf. Scripps-Howard Radio* v. *Comm'n*, 316 U. S. 4, 13 *et seq.*

4. There is involved a final judgment by the highest court of a state in a cause in which there is drawn in question the validity of a statute of the United States.—Petitioner's position in the courts below was that, because of the admittedly vague and uncertain coverage of the statute, the requirement that an employer might concede coverage and make restitution only at the peril of double liability violates the due process clause of the Fifth Amendment (R. 106). The point is material whether regarded as requiring, in the circumstances here presented, either the invalidation of statutory double liability or a construction of the Act which will avoid the constitutional issue.

This Court and the legislative proponents have said of the statute here in question that

> To search for a dependable touchstone by which to determine whether the employees are engaged in commerce or in the production of goods for commerce is as rewarding as an attempt to square the circle. (*Kirschbaum Co.* v. *Walling*, *supra*, p. 520.)
>
> "Necessary" is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority. (*Id.*, p. 525.)
>
> This act combines everything, and is an attempt to take advantage of whatever theories may prevail on the Court at the time that the case is heard. (Robert H. Jackson, *Hearings before the Senate Committee on*

Education and Labor and House Committee on Labor on S. 2475 and H. R. 2700, 75th Cong., 1st Sess., 1937, p. 54.)

Other essential definitions in the statute are similarly uncertain.[7] The word "necessary", Chief Justice Marshall said,

> has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. (*McCulloch* v. *Maryland*, 4 Wheat. 316, 414.)

Yet this is the standard to which petitioner has been held required to conform upon pain of double liability.

The *Kirschbaum* case raised the possibility of coverage but of course could not settle applicability to individual properties. Prior thereto the Appellate Division had held there was no coverage of building service employees (*Killingback* v. *Garment Center Capital, Inc.*, 259 App. Div. 691) and the Court of Appeals denied leave to appeal (248 N. Y. 818). See also *Pederson* v. *Fitzgerald Construction Co.*, 262 App. Div. 655, affirmed 288 N. Y. 687. The United States District Court for the Southern District of New York dismissed the companion of the *Kirschbaum* case instituted by the Administrator (*Fleming* v. *Arsenal Bldg. Corporation*, 38 F. Supp. 207 (1941)) and the Circuit Court of Appeals in reversing conceded that "so far the score is

[7] "In determining whether * * * underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 597. "Presumably [with reference to the definition of regular rate in the statute] Congress refrained from attempting such a definition because the employment relationships to which the Act would apply was so various and unpredictable." *Walling* v. *Belo*, 316 U. S. 624, 634.

four to one against the view we take" (125 F. 2d 278, 281). See also *Cecil* v. *Gradioson* (Ohio), 40 N. E. 2d 598 (1941); *Robinson* v. *Massachusetts Mutual Life* (Tenn.), 158 S. W. 2d 441 (1941).

When upon the decision of the *Kirschbaum* case it became possible that in the exigencies of litigation petitioner's building property might be held subject to the coverage of the statute, petitioner voluntarily and fully paid the overtime due if the statute were to apply. In such circumstances, to hold that petitioner is required to pay double compensation becomes so unreasonable as to deprive petitioner of due process of law. To be sure, the double liability provided by the statute is designed to afford compensation rather than to be a penalty (*Overnight Motor Co.* v. *Missel, supra*, pp. 583-584) but, if applied in the situation here presented, it becomes a double liability which can be considered "compensation" only through fiction. This is not a case where a statute is drawn in broad terms to guide an administrative agency in issuing specific regulations (*cf. United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 237-238) operative only for the future (*cf. Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218, 228). It is instead a statute which requires absolute compliance upon pain of double liability. Where the coverage of such a statute is uncertain—as is admittedly true here—a long line of decisions of this Court holds it violative of due process.

Thus vaguely worded state antitrust acts have been held invalid. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216 (per Holmes, J.); *Collins* v. *Kentucky*, 234 U. S. 634 (per Hughes, J.); *American Machine Co.* v. *Kentucky*, 236 U. S. 660 (per McKenna, J.); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (per Taft, C. J.). The Food Control Act of 1917, applicable to "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries";

was similarly held void with reference both to the penalties imposed (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81) and the invalidation of contracts thereunder (*Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, 237, 239-240). A state statute requiring contractors to pay their workmen not less than the "current rate of per diem wages in the localities where the work is performed" was held void for uncertainty. *Connally* v. *General Const. Co.*, 269 U. S. 385 (Holmes and Brandeis, JJ., concurring in the result). In holding invalid for uncertainty an Oklahoma statute prohibiting waste in the production of petroleum, this Court pointed out that "there is nothing to support defendants' suggestion that the regulatory provisions of the Act do not become operative until the commission has defined permissible production". *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 242-243. A state act defining a gangster to be anyone previously convicted of crime "known to be a member of any gang consisting of two or more persons" is violative of due process. *Lanzetta* v. *New Jersey*, 306 U. S. 451. Of course statutes may involve some difficulty of application without being invalid. *Cf. Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 196-197. But this Court has pronounced the Act here involved to be without a dependable touchstone by which to determine coverage.

5. The court below has decided an important question of federal law which should be decided by this Court.—The question here presented is important to all the vast number of employers subject or possibly subject to the coverage of the Fair Labor Standards Act. It affects not only owners of business premises but every mine operator subject to portal-to-portal coverage, insurance companies held to be subject to the commerce power, producers for interstate commerce who own buildings in which nonproduction employees work (*cf. Borella* v. *Borden Co.*, — F. 2d —, Second

Circuit, decided July 28, 1944), or any other employer who may be subjected to coverage not presently recognized.

The question is important to the Administrator of the statute because, in extending coverage and resolving disputes through equity proceedings, employers could consent to decrees only upon pain of double liability rather than actual restitution. Litigation will thus be intensified. As Senator Walsh of the Conference Committee stated when the measure was before Congress,

> To be successful, the law, with its commendable humanitarian objects, must be administered with the caution, care and sympathy of a physician and not with the autocracy and force of a police officer. (83 Cong. Rec. 9176-9177).

However, the result reached by the court below deprives the Administrator of much of his opportunity to execute the statute with care for the larger public interests.

The question is of importance to employees whom the Act seeks to protect because under the conclusion reached below no employer may make restitution or agree upon a settlement without liability for liquidated damages. As the Circuit Court of Appeals for the Second Circuit has said in sustaining the validity of releases upon settlements of seamen's wages under the Seamen's Act: "Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty." *The S. S. Standard, supra*, p. 439.

The question is of importance to good government and public morals. The Appellate Division below and numerous other courts have pronounced as harsh and unreasonable the rigid imposition of double liability. That employees may accept actual money restitution and, without returning

it and without expense for counsel fees, proceed to litigate for double liability opens the door to a vast litigious business. That anyone should profit from double liability where restitution has been made voluntarily and in full runs counter to common and accepted ideas of good conduct.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

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September, 1944.

APPENDIX.

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. § 201 et seq.) read as follows:

Sec. 3 (j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16 (b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or them-

selves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

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No. 448

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

BROOKLYN SAVINGS BANK,

Petitioner,

vs.

WILLIAM J. O'NEIL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	7
Argument	8

CITATIONS

Cases

Addison v. *Holy Hill Co.*, 322 U. S. 607	19
American Machine Co. v. *Kentucky*, 236 U. S. 660	17
Atchison etc. Ry. v. *Nichols*, 264 U. S. 348	15
Atlantic Co. v. *Broughton*, C. C. A. 5, decided December 4, 1944	11
Birbalas v. *Cuneo Printing Industries*, 140 F. 2d 826	10
Bergschneider v. *Peabody Coal Co.*, 142 F. 2d 784	10
Board of Comm'rs v. *United States*, 308 U. S. 343	9
Brady v. *Daly*, 175 U. S. 148	16
Cecil v. *Gradioson* (Ohio), 40 N. E. 2d 598	16
Champlin Rfg. Co. v. *Commission*, 286 U. S. 210	17
Chicago, Milwuakee, etc. Ry. Co. v. *Clark*, 178 U. S. 353	13
City Bank Farmers Trust Co. v. *McConnell*, 284 N. Y. 686	9
Cline v. *Frink Dairy Co.*, 274 U. S. 445	17
Collins v. *Kentucky*, 234 U. S. 634	17
Connally v. *General Const. Co.*, 269 U. S. 385	17
Cox v. *Lykes Brothers*, 237 N. Y. 376	14
Davis v. *N. Y. Central*, 233 N. Y. 242	9
Deitrick v. *Greaney*, 309 U. S. 190	9
Dize v. *Maddrix*, 144 F. 2d 584	11
E. I. S. Mfg. Co. v. *Supco Products Corporation*, 26 F. Supp. 758	14
Eclipse Bicycle Company v. *Farrow*, 199 U. S. 581	4
Erie Railroad v. *Tompkins*, 304 U. S. 64	9

	Page
Fashion Guild v. *Trade Comm'n*, 312 U. S. 457	9
Fleming v. *Arsenal Bldg. Corporation*, 38 F. Supp. 207, reversed 125 F. 2d 278	16
Fleming v. *Warshawsky & Co.*, 123 F. 2d 622	10
Flynn v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53	14
Gangi v. *D. A. Shulte*, 53 F. Supp. 844	10, 19
Garrett v. *Moore-McCormack Co.*, 317 U. S. 239	9, 14
Griffin v. *McCoach*, 313 U. S. 498	9
Guess v. *Montague*, 140 F. 2d 500	10, 15, 20
Hecht Co. v. *Bowles*, 321 U. S. 321	14
Helvering v. *Leonard*, 310 U. S. 80	9
Helvering v. *Mitchell*, 303 U. S. 391	15
Higgins v. *Carr Bros. Co.*, 317 U. S. 572	5
Huntington v. *Attrill*, 146 U. S. 657	15
International Harvester Co. v. *Kentucky*, 234 U. S. 216	17
Killingback v. *Garment Center Capital Inc.*, 259 App. Div. 691, appeal denied 248 N. Y. 818	16
Kirschbaum Co. v. *Walling*, 316 U. S. 517	3, 5, 16
Klaxon Co. v. *Stentor Co.*, 313 U. S. 487	9
Lockerty v. *Phillips*, 319 U. S. 182	17
McLeod v. *Threlkeld*, 319 U. S. 491	5
Mellon v. *Goodyear*, 277 U. S. 335	14
Missouri Pacific Railway Co. v. *Humes*, 115 U. S. 512	16
O'Brien v. *Lodi*, 246 N. Y. 41	9
Overnight Motor Co. v. *Missel*, 316 U. S. 572	5, 13, 16
Pederson v. *Fitzgerald Construction Co.*, 262 App. Div. 655, affirmed 288 N. Y. 687	16
Radio Corp. v. *Raytheon Co.*, 296 U. S. 459	14
Rigopoulos v. *Kervan*, 140 F. 2d 506	10, 18
Robinson v. *Massachusetts Mutual Life* (Tenn.), 158 S.W. 2d 441	16
Savage v. *United States*, 92 U. S. 382	13
Schneiderman v. *United States*, 320 U. S. 118	17
Scripps-Howard Radio v. *Comm'n.*, 316 U. S. 4	14
Security Adm'r v. *Quaker Oats Co.*, 318 U. S. 218	16
Seminole Nation v. *United States*, 316 U. S. 286	13
Seneca Coal & Coke Co. v. *Lofton*, 136 F. 2d 359, cert. denied 320 U. S. 772	10
Skidmore v. *Swift*, No. 12, December 4, 1944	16
Small Co. v. *American Sugar Ref. Co.*, 267 U. S. 233	17

Page

Southland Co. v. *Bayley*, 319 U. S. 44 13
Stoner v. *New York Life Ins. Co.*, 311 U. S. 464 9
Stockwell v. *United States*, 13 Wall. 531 15
Tennessee Coal Co. v. *Muscoda Local*, 321 U. S. 590 16
The S. S. Standard, 103 F. 2d 437 ..... 14, 19
United States v. *Cohen Grocery Co.*, 255 U. S. 81 17
United States v. *Harvey Steel Co.*, 196 U. S. 310 4
United States v. *Katz*, 271 U. S. 354 20
United States v. *Pennsylvania R. R. Co.*, 242 U. S. 208 16
United States ex rel. Marcus v. *Hess*, 317 U. S. 537 15
Vance v. *Chicago Portrait Co.*, 19 F. 2d 981 4
Vandenbark v. *Owens-Illinois Co.*, 311 U. S. 538 9
Walling v. *Belo*, 316 U. S. 624 16
Walling v. *Helmerick & Payne, Inc.*, No. 27, November 6, 1944 13
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564 5
West v. *A. T. & T. Co.*, 311 U. S. 223 9

Statutes and Miscellaneous

Congressional Record, Vol. 83:
p. 9255 ..... 11, 12
p. 9264 12

Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.*:
Sec. 3(j) 5
Sec. 6 12
Sec. 7 ..... 5, 12
Sec. 7(a) 2, 11
Sec. 11 12
Sec. 13(a) (2) 5
Sec. 14 12
Sec. 15 ..... 12, 18
Sec. 16 ..... 3, 11, 12, 14
Sec. 17 12
Federal Employers' Liability Act 13
Food Control Act of 1917 17
Harvard Law Review, Note, 54 Harv. L. Rev. 663 9
Judiciary Act, 1 Stat. 73, 28 U. S. C. ,725 9

Page

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C.:
Sec. 908(i) 14
Sec. 915(b) 14
New York Debtor and Creditor Law, Sec. 243 9
Patent Laws 14

Seamen's Act, 46 U. S. C.:
Sec. 596 11
Sec. 597 14
Sec. 644 14
Senate Report No. 844, 75th Cong., 1st Sess., 1937 11
Sherman Act 14

Wage and Hour Division, Annual Reports:
1939, pp. 60–61 18
1940, pp. 87, 90 18

Wage and Hour Manual:
(1940), p. 120 11
(1941), p. 165 11
(1942), p. 729 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK,

Petitioner,

vs.

WILLIAM J. O'NEIL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

Opinions Below

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed the complaint without opinion. The opinion of the Appellate Term (R. 59) is reported at 180 Misc. 542. The majority and dissenting opinions in the Appellate Division, First Department (R. 65-73), are reported at 267 App. Div. 317. The Court of Appeals of the State of New York wrote no opinion.

Jurisdiction

The Court of Appeals of the State of New York—which is the highest court of the State in which a decision in the

suit could be had—issued its remittitur on June 14, 1944 (R. 75). The order of the Municipal Court of the City of New York making the order of the Court of Appeals the order of the Municipal Court of the City of New York was entered on August 17, 1944 (R. 77). The final judgment of the Municipal Court of the City of New York was entered on the same day, August 17, 1944 (R. 78-80). Petition for writ of certiorari was filed September 8, 1944, and was granted November 6, 1944 (R. 83). The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether an employee has a right to statutory liquidated damages for non-payment of overtime under the Fair Labor Standards Act where, prior to either claim or suit therefor, the employer has voluntarily paid the full amount of such overtime and the employee has given a release of any such additional liability.

Statute Involved

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.*) are as follows:

> Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16 (b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated; or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Statement

Subject to collective bargaining agreements (R. 7-8), the respondent here was employed as a night watchman at an eleven-story business building at 443 Fourth Avenue, New York City, from November 5, 1938, to August 30, 1940 (R. 13). Petitioner bank, located in Brooklyn (R. 7, 9), was the owner of the building (R. 3).

On June 1, 1942, this Court handed down its decision in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 519, holding that the federal wage and hour act applied to service employees at buildings the tenants of which "are principally engaged in the production of goods for interstate commerce." Respondent had left petitioner's employ nearly two years prior thereto (R. 13, 45). The building leases contained covenants against manufacturing (R. 44-45) which were

enforced (R. 43).[1] Nevertheless—because of the stringent penalties of the statute and the uncertainties and cost of litigation (R. 7-8)—petitioner voluntarily calculated respondent's overtime due if the Fair Labor Standards Act were applicable (which came to $423.16) and, without any demand whatever from respondent (R. 17), sought him out and tendered it to him (R. 15). Respondent, without protest (R. 17), accepted the overtime so calculated and in writing released petitioner "from any and all claims, debts, damages, or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment" (R. 7-8, 42-3, 50).

Respondent then—without returning the amount so received in settlement (R. 4),[2] without protest to or demand upon petitioner (R. 17), and admitting that the amount of overtime had been correctly calculated in the settlement and fully paid (R. 4)—instituted action in the Municipal Court for the City of New York for the recovery of liquidated damages in an amount equal to the sum he had already been paid ($423.16) plus attorney's fees and interest from the time his employment ceased (R. 5). The trial court, after hearing the evidence, granted petitioner's motion to dismiss (R. 51). The Appellate Term reversed per curiam (R. 59, 56). The Appellate Division affirmed per curiam (R. 65-66), two justices dissenting (R. 66-73). The Court of Appeals affirmed without opinion (R. 75-76) and, upon its remittitur (R. 75-77), the Municipal Court made

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[1] The leases were introduced (R. 47) and show upon their face that they are the standard form of office lease (R. 43-44) long in use. It is a matter of common knowledge that union contracts specify different terms and conditions of employment in buildings where manufacturing is permitted. More stringent local health and safety regulations also apply to buildings where manufacturing is permitted.

[2] *Cf. Eclipse Bicycle Company* v. *Farrow*, 199 U. S. 581, 587; *United States* v. *Harvey Steel Co.*, 196 U. S. 310, 315-316; *Vance* v. *Chicago Portrait Co.*, 19 F. 2d 981, 986 (C. C. A. 7, 1927).

its order (R. 77) and entered the final judgment (R. 78-80).

In these proceedings there were involved both the coverage of the Act, as applied to the building in which respondent served as watchman,[3] and the effect of the voluntary payment and release. Petitioner did not, however, ask this Court to review the question of coverage because it regarded that issue not of general importance since it was essentially a fact question governed by the nature of the business conducted by tenants in a particular building during a limited period long past; but, since petitioner as a bank is the owner of business property, the validity of the voluntary payment and release was and is of general future importance to it and others similarly situated (Petition, p. 5). The remittitur of the court below (R. 76) certi-

[3] At the trial of the instant case respondent called several employees and one tenant who testified that nine of the twenty-seven tenants of the building (R. 46) dealt in goods which in some part came from outside the state or might be sent beyond the state (R. 18-50). Apart from the lack of qualification of such witnesses to testify as to the nature of the business (R. 19) and their failure to identify the period for which they spoke (R. 41) none of them testified that the tenants were engaged in any actual and substantial production for interstate commerce. There was thus insufficient evidence for coverage either as to goods received or goods sold. As to goods received, the statute applies only to "employees * * * engaged in commerce" rather than necessary to commerce; and the coverage sustained in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 574-575, is inapplicable because it involved a rate clerk of an interstate bus company. Compare *McLeod* v. *Threlkeld*, 319 U. S. 491. There was no evidence of special orders warranting the coverage sustained in the first two situations discussed in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 566-569, but the instant situation falls rather within the third situation there to the effect that "evidence of a wholly general character * * * lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local distribution" (p. 570). *Cf. Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, 574. As to sales, Section 13 (a) (2) of the Act expressly exempts from Section 7 "any employee in any retail establishment the greater part of whose selling * * * is in intrastate commerce." In order that respondent be covered by the Act it was necessary—and the case was tried on the theory (R. 18-50)—that he be engaged in an "occupation necessary to the production" (Section 3 (j)) "of goods for [interstate] commerce" (Section 7), as this Court held in the *Kirschbaum* case (pp. 524-525).

fies that there was presented to it the question of law which this Court is asked to review.

This Court granted certiorari to review the essential question presented (R. 83).

Specification of Errors to Be Urged

The Court of Appeals of the State of New York erred:

(1) In holding that the release of all further claims and damages under the Fair Labor Standards Act, freely executed by the employee and delivered to his employer at the time he received payment of all overtime compensation due him under the Act, is not a good defense to an action subsequently brought by such employee solely to recover liquidated damages.

(2) In refusing to permit compromise of the employee's claim for liquidated damages in direct conflict with prior decisions of this and other Courts sanctioning compromise of penalties, damages, or other liabilities under similar statutes.

(3) In holding that the liquidated damages as distinguished from overtime compensation is so affected with public interest that it may not be released by the employee.

(4) In holding that the employee may not evaluate for himself the damages suffered as a result of the delay in payment where full overtime compensation is paid.

(5) In failing to give effect to the well established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation where the statutory purposes have been fully accomplished.

(6) In permitting the respondent to repudiate the settlement and, while still retaining the benefits received thereunder, to institute suit for the recovery of an addi-

tional amount without risking the loss of the benefits derived from the settlement in the event that he fails to establish coverage.

Summary of Argument

Respondent employee received his full overtime without claim or litigation, freely and with full knowledge gave a complete release of all additional liability, but was nevertheless subsequently permitted to recover liquidated damages plus attorney's fees, interest, and costs. Such a result is contrary to law because—

(1) The statute does not outlaw such a release. It imposes liability for liquidated damages only for "unpaid" minimum wages or overtime; unlike other legislation of the same nature, it does not even specify when such compensation shall be paid; and the court below has therefore made delay of payment the condition of liability rather than failure of payment as specified in the statute. The statute contemplates liquidated damages only as an incident to suit for *unpaid* overtime or *unpaid* minimum wages and not litigation for such damages independently of compensation previously and voluntarily paid in full. The statute treats liquidated damages not as a part of the base liability but as secondary, personal, and remedial. Neither civil nor criminal enforcement provisions of the statute apply to unpaid damages.

(2) Upon general principle—at least in the absence of statutory prohibitions to the contrary—the federal courts permit all manner of voluntary settlements either with or without releases, sustain the release of workmen's wage claims, and allow the compromise of multiple damage liability. Congress, which must be presumed to have legislated with this general state of the law in mind, has rarely

provided otherwise by statute and even then only to a limited extent. Neither the legal nature, legislative design, nor public purpose of damage provisions requires them to be treated as so fixed and absolute that they may not be the subject of mutually voluntary adjustment or waiver.

(3) Even if despite uncertain coverage the statute may be constitutionally construed to prohibit in any circumstances settlements for less than 200% of the base liability, the canon of statutory construction requires no such harsh result here. It will make difficult both official enforcement and private adjustments, foster litigation, and be injurious to both employees and employers. The result reached by the court below was not intended by Congress and is both unnecessary upon the face of the statute and contrary to accepted ideas of good conduct.

Argument

The basic question here is whether the statute itself precludes, or may be construed to preclude, the extinguishment of double liability on the facts of this case. In its per curiam the Appellate Term said only that respondent "was employed in the production of goods for commerce within the meaning of the Fair Labor Standards Act" (R. 59) and the Appellate Division said only that (R. 65)—

> We appreciate that the result of our decision may seem harsh. The harshness, however, is inherent in the legislation and the decisions which have construed it.

The only full opinion written was that of the two dissenting justices in the Appellate Division sustaining petitioner's contentions (R. 66-73). Although they wrote no

majority opinions, each of the intermediate appellate courts granted leave to appeal (Appellate Term, R. 55; Appellate Division, R. 62).

The question here is therefore one solely of federal law.[4] The decisions of the circuit courts of appeals favor the validity of releases upon full voluntary payment of wages

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[4] Since the right claimed by petitioner arises upon federal statute, "the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245. The record and decisions below show that this was the sole issue and sole ground of decision. The rule requiring conformity with state law does not apply "where the Constitution, treaties, or statutes of the United States otherwise require or provide" (1 Stat. 73, 92; 28 U. S. C. § 725) or "in matters governed by the Federal Constitution or by Acts of Congress." *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 77, 78. Where the right or claim arises upon federal law, the remedial details required to be supplied by judicial implication require in each instance the fashioning of a rule which is "ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of" the state in which the matter is presented. *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349-350; *Deitrick* v. *Greaney*, 309 U. S. 190, 200-201; *Helvering* v. *Leonard*, 310 U. S. 80, 85-86; *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 468; *Note*, 54 Harv. L. Rev. 663, 665 n. 16. This Court has been careful to say, in requiring conformity with state law, that the cases, though brought in federal courts, are not there because the substance is created by federal law but because of the accident of diversity of citizenship. *West* v. *A. T. & T. Co.*, 311 U. S. 223, 231; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, 467; *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 540; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496; *Griffin* v. *McCoach*, 313 U. S. 498, 503.

It may be noted that, in any event, attempt to apply state law in this case would be defeated by the following considerations: (1) There was no such claim presented below, and hence no such issue was preserved for presentation here. (2) If such an issue could now be presented here, this Court would remand the case to the court below for initial determination in accordance with state law or determine the matter itself pursuant to state law. (3) Under the law of the State of New York releases are allowable for the wrongful death of an employee (*Davis* v. *N. Y. Central*, 233 N. Y. 242), for injuries under the Workmen's Compensation Act (*O'Brien* v. *Lodi*, 246 N. Y. 41), and of claims under the deficiency judgment act (*City Bank Farmers Trust Co.* v. *McConnell*, 284 N. Y. 686). *Cf. New York Debtor and Creditor Law*, Sec. 243.

or overtime.[5] The decision below is erroneous for the following reasons:

(1) **Upon the face of the statute.**—The statute here involved does not specifically preclude a release upon voluntary restitution for the full amount of unpaid minimum wages or unpaid overtime compensation. Indeed, in the course of legislative consideration the measure was even

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[5] The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Guess* v. *Montague*, 140 F. 2d 500, 504 (1943) and the decision of the United States District Court for the Southern District of New York in *Gangi* v. *D. A. Shulte*, 53 F. Supp. 844 (1943). In these two cases there were, as in the instant case, a voluntary payment prior to the institution of suit of the full amount of overtime due if the Act applied (excluding liquidated damages or attorney's fees) and execution of a release by the employee. In *Fleming* v. *Post* (C. C. A. 2, decided December 14 or 15, 1944) a contrary result is reported but, as this brief goes to press, counsel have not had an opportunity to examine the opinion.

In *Fleming* v. *Warshawsky & Co.*, 123 F. 2d 622 (C. C. A. 7, 1941) the Wage and Hour Administrator had brought an injunction proceeding to force the payment of the amount of overtime due, a consent decree was entered but not honored, the Administrator brought contempt proceedings to force the agreed payments of overtime, and the defendants pleaded full releases; but, as there had been no payment of the full overtime due, the question was whether employees could release all rights, and liquidated damages and attorney's fees were not involved and could not be involved. In *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359 (C. C. A. 10, 1943), cert. denied 320 U. S. 772, unlike the instant case, there was no release but liquidated damages and attorney's fees were allowed despite voluntary payment without suit. In *Rigopoulos* v. *Kerran*, 140 F. 2d 506 (C. C. A. 2, 1943)—which the Appellate Division below cited in its per curiam for the proposition that there was "no escape from the statutory language" (R. 65)—the court held that there was no evidence of an accord (p. 508). The payments had been forced by injunction proceedings instituted by the Administrator (47 F. Supp. 576). Similarly, in *Birbalas* v. *Cuneo Printing Industries*, 140 F. 2d 826 (C. C. A. 7, 1944), only after the institution of injunction proceedings by the Administrator, institution of suit by the employees, and entry of a consent decree in the Administrator's suit did the defendant make the overtime payments and take releases of "all liabilities, penalties, actions, or causes of action" under the Act; and the court, lamenting "the law's harshness" as compared with the general public policy favoring the settlement of controversies, doubted the correctness of *Guess* v. *Montague* and held that the statute conferred "a single and entire cause of action which can not be discharged or satisfied by paying merely part of it" (p. 828). In *Bergschneider* v. *Peabody Coal Co.*, 142

purged of a provision precluding agreed waivers of compliance.[6] Literally, the statute imposes double liability only for "unpaid" minimum wages or "unpaid" overtime compensation, and then only in an "equal" amount (Section 16(b)). It does not even say when such wages or overtime shall be paid,[7] although in other legislation of similar subject matter it has done so (Seamen's Act, 46 U. S. C. § 596). Yet the court below has made delay the condition of liability rather than failure of payment as the statute specifies. The Conference Report in which this section of the statute was explained states that an employee may recover liquidated damages only equal to "the amount by which the compensation *he should have received exceeds that which he actually received*" (83 Cong. Rec. 9255, emphasis supplied).

Moreover, the statute obviously contemplates that liquidated damages—in an amount equal to the "unpaid" mini-

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F. 2d 784 (C. C. A. 7, 1944), there was full payment of overtime without release but the court denied recovery of liquidated damages by the employee cost clerk who kept the records on the ground that, while he had been paid late, he had been paid promptly upon reporting his hours. In *Dize* v. *Maddrix*, 144 F. 2d 584 (C. C. A. 4, 1944), an employee bookkeeper received part of his unpaid compensation and overtime, gave a release in full, but was held entitled to full liquidated damages on the whole amount because the voluntary payment was as the parties knew less than the principal amount due. In *Atlantic Co.* v. *Broughton* (C. C. A. 5, decided December 4, 1944) the court sustained settlement waiving liquidated damages as to amounts of wages or overtime compensation paid.

[6] There was eliminated from the measure a provision stating that

> Sec. 20—(b) Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void. (Senate Rep't No. 844, 75th Cong., 1st Sess., 1937.)

[7] Here the basic liability concerns overtime. Section 7 (a) simply requires the payment of overtime. The Administrator has recognized that, "depending on the circumstances," actual payment may be deferred for substantial periods (*Wage & Hour Manual* (1940), p. 120; (1941), p. 165). Here the overtime was voluntarily and fully paid, without request, promptly upon intimation of possible coverage.

mum wages or "unpaid" overtime compensation—shall be allowed only where employees are forced to litigate to recover such unpaid wages or unpaid overtime.[8] It does not literally confer a right to the liquidated damages where the base wage or overtime has *already* been paid, nor does it specifically establish an independent cause of action for liquidated damages *without* unpaid wages or overtime. Indeed, the liquidated damages were regarded as so secondary that Section 17 authorizing the Administrator to secure compliance through equity proceedings does not authorize decrees requiring the payment of such damages.[9] They are similarly omitted from the provision for criminal liability (Section 16(a)). Certainly these provisions do not preclude a release of liability for liquidated damages upon voluntary payment of unpaid wages or overtime. The purpose of the statute was to assure minimum

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[8] Section 16 (b) provides that the employer "shall be liable" for both overtime due and the liquidated damages, but the immediately following sentence plainly ties such double liability to "an action to recover such liability." The legislative history shows that Representative Keller, a member of the Conference Committee, stated that: "The employees can • • • maintain an action in any court to recover the *wages due* them and *in such a case* the Court shall allow liquidated damages in addition to the wages due *equal to such deficient payment* and shall also allow a reasonable attorney's fee and assess the court costs" (83 Cong. Rec. 9264, emphasis supplied). The provision, as he went on to say, was designed to minimize the cost of enforcement by the Government through placing in the hands of employees "the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the Act" (*id.*). The normal and reasonable reading of the provision is that action may be brought to recover unpaid overtime and, as an incident thereto, liquidated damages as well as attorney's fees and costs. The Administrator has so read it, and refers to the subdivision as one conferring a right of action for overtime "plus" damages, costs, and fees. (*Wage & Hour Manual* (1942), p. 729). The Conference Report assumes that liquidated damages may be recovered only where the employee has labored in excess of the maximum hours "without receiving the prescribed payment for overtime" (83 Cong. Rec. 9255).

[9] § 17 refers to § 15, which in turn refers only to §§ 6, 7, 11, and 14 entirely omitting § 16 (b) relating to liquidated damages, attorney's fees, and costs.

wages and overtime compensation (*Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 576-577; *Southland Co.* v. *Bayley*, 319 U. S. 4, 48; *Walling* v. *Helmerick & Payne, Inc.*, No. 27, decided November 6, 1944), not to pro-vide double compensation independently. There is no more reason to find independent liability for liquidated damages than to find it for attorneys' fees after even double liability has been paid voluntarily and in full.

Accordingly, in the absence of any dependable statutory guide or requirement to the contrary, the question must be determined upon general principles applied in the usual course of judicial proceedings.

(2) **On general principle.**—At least in the absence of provisions of Federal statutes to the contrary, the Federal courts in applying Federal law permit all manner of releases upon voluntary payment. Indeed, as this Court has said in an instance where there was no release but mere acceptance of payment—

> Decisions * * * by this court * * * show beyond all doubt that parties may adjust their own controversies in their own way, and that when they do so voluntarily, and with full knowledge of their rights and all the circumstances, no appeal lies to the courts to review their mutual decision. Courts cannot make contracts for parties; and if parties understandingly contract to adjust a controversy between them in a particular way, and actually execute the contract, they are both bound to regard the controversy as at an end. (*Savage* v. *United States*, 92 U. S. 382, 388-389.)

The same rule is reached where there is a settlement of claims and a formal release. *Chicago, Milwaukee & St. Ry. Co.* v. *Clark*, 178 U. S. 353; *Seminole Nation* v. *United States*, 316 U. S. 286, 290. There may be a settlement and release of compensation liability under the Federal Employers'

Liability Act. *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53 (per Holmes, J.); *Mellon* v. *Goodyear*, 277 U. S. 335. Seamen, traditionally regarded as the wards of admiralty, may release liability for personal injuries if—as here (R. 15-17, 42, 50)—it is done without coercion or deception. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 246-248; *The S. S. Standard*, 103 F. 2d 437 (C. C. A. 2, 1939). Multiple damages are provided in many situations under Federal law but, upon equitable principles, a release may be effective respecting treble damages under the Sherman Act. (*Radio Corp.* v. *Raytheon Co.*, 296 U. S. 459, 462-463) and a release will be honored notwithstanding the treble damage right accorded under the patent laws for infringement. *E. I. S. Mfg. Co.* v. *Supco Products Corporation*, 26 F. Supp. 758, 760-761 (S. D. N. Y. 1938).

Congress must be presumed to have legislated with this general state of the law in mind. *Cf. Hecht Co.* v. *Bowles*, 321 U. S. 321, 329; *Scripps-Howard Radio* v. *Comm'n*, 316 U. S. 4, 13 *et seq.* As stated in note 6 *supra*, the measure which became the Act here involved was purged of a provision against waivers. Congress has rarely disturbed the general law by legislating expressly upon the subject. Under the Seamen's Act it has required only that releases be executed before a shipping commissioner (46 U. S. C. §644) and has provided that "any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require" (*id.*, §597). *Cf. Garrett* v. *Moore-McCormack Co., supra*, p. 247; *The S. S. Standard, supra*, p. 439; *Cox* v. *Lykes Brothers*, 237 N. Y. 376 (per Cardozo, C. J.) In the Longshoremen's and Harbor Workers' Compensation Act, Congress prohibited waivers of compensation (33 U. S. C. §915(b)) except within limitations and upon official approval (*id.*, §908(i)).

That Section 16(b) of the statute here involved has been said to be "mandatory on the courts, regardless of the

good faith of the employer or the reasonableness of his attitude" (*Overnight Motor Co.* v. *Missel, supra,* pp. 581-582) does not mean that settlements by the parties are outlawed; for that was said in a case where there was neither payment nor release, and the employee was compelled to litigate his right to overtime. There this Court affirmed the same circuit court of appeals that decided *Guess* v. *Montague,* note 5, *supra,* contrary to the decision below in the instant case. See also *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 602.

Neither the legal nature, legislative design, or public purpose of damage provisions requires them to be treated as so fixed and absolute that they may not be the subject of mutual and voluntary adjustment or waiver by the parties in the circumstances here presented. Since the purpose of double damage statutes is to secure adequate restitution (*United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 551-552), no reason appears why such a party may not accept full voluntary restitution and waive damages, fees, and costs at least where—as here—he has not been put to the necessity of making claims or litigating issues. Such statutory provisions have been held purely remedial (*Huntington* v. *Attrill,* 146 U. S. 657, 668 *et seq.; Helvering* v. *Mitchell,* 303 U. S. 391, 401; *Stockwell* v. *United States,* 13 Wall. 531, 551), so that the party for whose benefit they exist needs no special authority to waive them where the party liable voluntarily offers full restitution, renders exercise of the exceptional remedial rights unnecessary, and —as here—receives a freely given release of any further liability. Since multiple damages are designed to be remunerative and afford indemnity for loss (*Atchison etc. Ry.* v. *Nichols,* 264 U. S. 348, 352; *Stockwell* v. *United States, supra,* p. 547), no reason appears why the beneficiary may not waive the excess over a voluntary payment which makes him whole. Since liquidated damages are provided where

damages are difficult to measure and hence conjectural (*Overnight Motor Co.* v. *Missel, supra,* pp. 583-584; *Brady* v. *Daly,* 175 U. S. 148, 154; *Missouri Pacific Railway Co.* v. *Humes,* 115 U. S. 512, 522-523), the purpose of the law is more exactly met where the parties freely reach a settlement—at least where, as here, that settlement has been completely voluntary and leaves the party for whose protection the statute is designed with not less than he was entitled to in the first instance.

(3) **In good conscience and for good government.**—This Court has frequently stressed the lack of dependable guide for the coverage of the statute here involved. *Kirschbaum Co.* v. *Walling, supra,* p. 520; *Tennessee Coal Co.* v. *Muscoda Local, supra,* p. 597; *Walling* v. *Belo,* 316 U. S. 624, 634.[10] It is not a statute drawn in broad terms to guide an administrative agency in issuing specific regulations (*cf. United States* v. *Pennsylvania R. R. Co.,* 242 U. S. 208, 237-238) operative only for the future (*cf. Security Adm'r* v. *Quaker Oats Co.,* 318 U. S. 218, 228). It is instead a statute which, so the court below assumes, requires compliance upon pain of double liability without administrative specification of applicability. *Cf. Skidmore* v. *Swift and Company,* No. 12,

[10] The *Kirschbaum* case raised the possibility of coverage of service employees in a building where production for interstate commerce takes place, but of course it could not settle applicability to individual properties. Prior thereto the Appellate Division had held there was no coverage of building service employees (*Killingback* v. *Garment Center Capital, Inc.,* 259 App. Div. 691) and the Court of Appeals denied leave to appeal (248 N. Y. 818). See also *Pederson* v. *Fitzgerald Construction Co.,* 262 App. Div. 655, affirmed 288 N. Y. 687. The United States District Court for the Southern District of New York dismissed the companion of the *Kirschbaum* case instituted by the Administrator (*Fleming* v. *Arsenal Bldg. Corporation,* 38 F. Supp. 207 (1941)) and the Circuit Court of Appeals in reversing conceded that "so far the score is four to one against the view we take" (125 F. 2d 278, 281). See also *Cecil* v. *Gradison* (Ohio), 40 N. E. 2d 598 (1941); *Robinson* v. *Massachusetts Mutual Life* (Tenn.), 158 S. W. 2d 441 (1941).

decided December 4, 1944. Even if in this latter aspect the admittedly uncertain coverage of the statute does not render it violative of due process as petitioner has contended (R. 76) [11] or does not even require the statute to be construed to permit release of statutory damages upon voluntary payment in order to avoid questions of constitutionality (cf. *Lockerty* v. *Phillips*, 319 U. S. 182, 188; *Schneiderman* v. *United States*, 320 U. S. 118, 132), nevertheless the resulting application is harsh to the point that courts—including the Appellate Division in the instant case—have disclaimed responsibility for the result. Not only does the statute not require such a result but the familiar canon of construction requires courts to avoid such a result not inescapably required by the language of the statute.

Good government and the settlement of controversies require reversal of the judgment below. If, as the Administrator resolves disputed applications through equity pro-

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[11] Vaguely worded state antitrust acts have been held invalid. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216 (per Holmes, J.); *Collins* v. *Kentucky*, 234 U. S. 634 (per Hughes, J.); *American Machine Co.* v. *Kentucky*, 236 U. S. 660 (per McKenna, J.); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (per Taft, C. J.). The Food Control Act of 1917, applicable to "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," was held void with reference both to the penalties imposed (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81) and the invalidation of contracts thereunder (*Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, 237, 239-240). A state statute requiring contractors to pay their workmen not less than the "current rate of per diem wages in the localities where the work is performed" was held void for uncertainty. *Connally* v. *General Const. Co.*, 269 U. S. 385 (Holmes and Brandeis, JJ., concurring in the result). In holding invalid for uncertainty an Oklahoma statute prohibiting waste in the production of petroleum, this Court pointed out that "there is nothing to support defendants' suggestion that the regulatory provisions of the Act do not become operative until the commission has defined permissible production." *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 242-243.

ceedings or administrative investigation and settlements,[12] employers may assent only upon pain of double liability despite actual restitution, litigation will be prolonged and intensified. Independently of such official enforcement proceedings or adjustments, under such an interpretation no employer may make voluntary restitution without for most practical purposes admitting liability for equal damages as well and indeed the employer might thereby also place himself in jeopardy of Section 15 (a) (1) of the statute for-

[12] In this phase of the administration of the statute, both settlements and restitution have been accepted by the Administrator (First Annual Report, Wage and Hour Division, 1939, pp. 60-61; 1940, pp. 87, 90). An official form of receipt for unpaid wages or overtime is used in these cases reading as follows:

RECEIPT FOR UNPAID WAGES

As Computed or Approved by
The Wage and Hour Division
under
The Fair Labor Standards Act of 1938

Date .....

Received $ ..... from .....

located at .....

which amount represents unpaid wages computed or approved by the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 and covering the period or periods of employment from ..... to .....

Signed .....
Address .....

U. S. Government Printing Office 16--112754

This practice is referred to in *Rigopoulos* v. *Kerran*, 140 F. 2d 506, 508 (C. C. A. 2, 1943). The Administrator has never announced in his interpretative bulletins, nor in individual cases are the parties found liable on investigation informed, that the payment of alleged due and unpaid compensation is a settlement of only half a claim. Should the Solicitor General file a brief as invited by the Court, the practice in this respect may well be elucidated.

bidding his product from moving in interstate commerce. Both employees and employers will thus be deterred from settling individual cases or from securing concessions of, or conceding, new applications of the statute. As the Circuit Court of Appeals for the Second Circuit has said in sustaining the validity of releases upon settlements of seamen's wages under the Seamen's Act: "It would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty." *The S. S. Standard*, *supra*, p. 439. The situation is even stronger here because the employee has received full voluntary compensation without claim or suit yet asks to be allowed to pocket the payment, repudiate a release freely and advisedly given, and litigate for double recovery without the expense of counsel fees. Certainly Congress could have intended neither to preclude releases of damages upon voluntary restitution nor to foster litigation for statutory damages where the principal had previously been paid in full. That anyone should profit from double liability where a release has been given in return for full voluntary restitution runs counter to accepted ideas of good conduct. "The assertion of this claim is sharp practice, offensive to every moral instinct, and assiduous search of the Statute fails to reveal anything which renders it fair or legal." *Gange v. D. A. Schulte*, *supra*, p. 846.

Such a result, where it has been attained, derives from judicial interpretation rather than the terms of the statute, for it draws "on some unexpressed spirit outside the bounds of the normal meaning of words." *Cf. Addison v. Holly Hill Co.*, 322 U. S. 607, 617. Even "a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable applica-

tion can be given to it, consistent with the legislative purpose." *United States* v. *Katz*, 271 U. S. 354, 357. Here an interpretation absolutely forbidding, under any circumstances, a settlement for less than 200% is unreasonable upon its face. It is required by neither the statute nor for the protection of employees. As the Circuit Court of Appeals for the Fourth Circuit has said, recognition of the right of the parties to settle liquidated damages upon payment of full voluntary restitution—

> will encourage employers to settle claims for unpaid minimum wages and overtime compensation, with assurance that when a full and fair settlement is made there will be no danger of further liability. On the other hand, it will preserve the threat of recovery of liquidated damages if full payment of minimum wages and overtime compensation, as required by the act, is not made. In other words, it will encourage compliance with the law and minimize the opportunity to take unjust advantage of its provision. (*Guess* v. *Montague*, *supra*, p. 505.)

The employee is deprived of nothing, for a settlement requires mutuality and a release requires volition.

It is respectfully submitted that the decision below should be reversed and remanded with instructions to enter a judgment of dismissal.

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December, 1944.

INDEX

I

Page

The Solicitor General agrees with petitioner that the question here is one of statutory construction and that settlements waiving liquidated damages may be made under the statute 2

II

The Solicitor General erroneously (a) assumes that in this case there was a release of statutory wages and (b) fails to distinguish between settlements and mere waivers 3

III

Both respondent and the Solicitor General draw erroneous conclusions from this Court's limitation of review to the factual situation presented 5

IV

Respondent's contention that the liquidated damages are "indivisible" ignores the statute, legislative intent, administrative interpretation, and practicalities of employer-employee relationships 9

V

The Solicitor General, conceding the propriety of releases of liquidated damages but contending that the release here is unlawful because of the circumstances under which it was given, injects issues into the case which were not presented below and are based on assumptions contrary to fact 13

(a) The alleged "overreaching" by petitioner in securing the release is contrary to fact 13

(b) The assumed lack of a "dispute" or "consideration" ignores the facts and the law 18

CITATIONS

Cases

	Page
Chicago, Milwaukee, &c., Ry. Co. v. *Clark*, 178 U. S. 353	24, 25
Fletcher v. *Jones*, 105 F. 2d 58, cert. denied 308 U. S. 555	13
Higgins v. *Carr Bros. Co.*, 317 U. S. 572	21
Jones v. *United States*, 137 U. S. 202	13
Kirschbaum Co. v. *Walling*, 316 U. S. 517	18, 21
Klamath Indians v. *United States*, 296 U. S. 244	14
McLeod v. *Threlkeld*, 319 U. S. 491	21
Mutual Life Insurance Company v. *Phinney*, 178 U. S. 327	17
North Shore Corporation v. *Barnett; same* v. *Scott*, 143 F. 2d 172, cert. granted, Nos. 345 and 346, October 9, 1944	19
Overnight Motor Co. v. *Missel*, 316 U. S. 572	11, 16, 21
Overstreet v. *North Shore Corporation*, 318 U. S. 125	19
Red Canyon Sheep Co. v. *Ickes*, 98 F. 2d 308	13
Underhill v. *Hernandez*, 168 U. S. 250	13
Upton v. *Tribilcock*, 91 U. S. 45	17
The Wallace Corporation v. *National Labor Relations Board* and *Richwood Clothespin and Dish Washers Union* v. *National Labor Relations Board*, Nos. 66 and 67, December 18, 1944	3
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564	21
Walton v. *Southern Package Corp.*, 320 U. S. 540	19

Miscellaneous

Act of March 4, 1913, Sec. 8, 37 Stat. 738, 29 U. S. C. § 51	3
Congressional Record, Vol. 83:	
p. 9255	8
p. 9264	8, 9
Executive Order No. 9017, 7 F.R. 237	3
Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. §§ 201 *et seq.*:	
Sec. 2(a) and (b)	3

	Page
Sec. 3(j)	21
Sec. 6	9, 12
Sec. 7	9, 12, 21
Sec. 16(b)	1, 12
Sec. 17	8, 12
National Labor Relations Act, Sec. 1, 49 Stat. 449, 29 U.S.C. § 151	3
New York Debtor and Creditor Law, Sec. 243	25
Norris-LaGuardia Act, Sec. 8, 47 Stat. 72, 29 U.S.C. § 108	3
Railway Labor Act, 44 Stat. 578 and 579, 48 Stat. 1189 and 1193, 45 U.S.C. §§ 153, 154	3
Wage and Hour Division, Annual Reports:	
1940, p. 146	8
1941, p. 98	8
Wage and Hour Division, Form CI-31A (Summary of Unpaid Wages under the Fair Labor Standards Act of 1938 and Employees' Acknowledgment of Payment)	15
Wage and Hour Division, Form CI-318 (Affidavit)	15
Williston, Contracts	23

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK, *Petitioner,*

vs.

WILLIAM J. O'NEIL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE PETITIONER

The question here is whether, after voluntary payment in full of overtime claimed and the taking of a release of any further liability, the employer may nevertheless be subject to suit for statutory liquidated damages under Section 16(b) of the Fair Labor Standards Act of 1938. The trial court held for petitioner, but the appellate courts below deemed the statute such as to invalidate all releases. At the trial there were issues both (1) as to coverage of the building and (2) as to the validity of releases given upon full voluntary payment of overtime compensation.

The issues below, and hence the issue here, is whether the Fair Labor Standards Act itself precludes settlements. Three positions have been taken in the briefs. Petitioner has taken the position that the statute does not prohibit the settlement. Respondent takes the position that, assuming there may be no settlement of the base wage or overtime, there can be no settlement of liquidated damages because the two are "indivisible." The Solicitor General, filing a brief *amicus* at the suggestion of the Court, agrees with petitioner that there may be a settlement but takes the position that the particular settlement here involved is invalid because of the circumstances.

In arguing these several positions, considerable confusion is created by failure to distinguish between bona fide settlements and mere contracts waiving statutory rights, between settlements of wages and releases of damages, between law and administration, and between the issue in this case and the possibilities in various other hypothetical situations.

I

The Solicitor General agrees with petitioner that the question here is one of statutory construction and that settlements waiving liquidated damages may be made under the statute.

The Solicitor General states, and petitioner agrees, that "whether or not a statutory right may be released by an individual beneficiary depends upon the intention of Congress as manifested in the particular statute" (Br. 10); and the Solicitor General assumes that "a release of the statutory right to liquidated damages under the Fair Labor Standards Act might be valid" under proper circumstances (Br. 23). The statute here contains no prohibition against settlements, and indeed such a provision was eliminated from the bill (Pet. Br. 10-11 note 6). It is

petitioner's position that, in the absence of such a prohibition and where settlements do not defeat the operation of the statute, they are manifestly lawful because recognized and favored in all fields of the law (Br. 13-16). In the few instances where Congress has desired to modify this practice, it has done so expressly (Pet. Br. 14). Particularly in federal labor legislation, adjustment and agreement are a basic feature of both law and administration.[1] The Fair Labor Standards Act itself recites that its purpose is to "correct and as rapidly as practicable to eliminate" all "labor disputes burdening and obstructing commerce and the free flow of goods in commerce" (Sec. 2(a) and (b)). Petitioner, as set forth in its brief on the merits (pp. 10 *et seq.*), is confident that no statutory impediment to settlements may be implied from the statute here involved.

II

The Solicitor General erroneously (a) assumes that in this case there was a release of statutory wages and (b) fails to distinguish between settlements and mere waivers.

(a) Here any liability to pay statutory wages or overtime has admittedly been voluntarily paid in full prior to

[1] The Labor Department mediates labor disputes (37 Stat. 738). The Norris-LaGuardia Act prohibits injunctions being granted any party "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration" (47 Stat. 72). The Labor Relations Act in its declaration of policy commends "friendly adjustments of industrial disputes arising out of differences." (49 Stat. 449). The Railway Labor Act provides for adjustment and mediation boards (44 Stat. 578 and 579; 48 Stat. 1189 and 1193). The third paragraph of Executive Order No. 9017 establishing the National War Labor Board grounds procedure upon conciliation and agreement (7 F. R. 237). This Court has recently emphasized that the National Labor Relations Board "has from the very beginning encouraged compromises and settlements." *The Wallace Corporation* v. *National Labor Relations Board* and *Richwood Clothespin and Dish Washers Union* v. *National Labor Relations Board*, Nos. 66 and 67, October Term, 1944, December 18, 1944.

demand or suit (Pet. Br. 4). The Solicitor General, however, states the question as though there were presented in this case a question as to the release of liability for *both* "unpaid wages and liquidated damages" (Br. 3). But the question here is, as stated in petitioner's brief (p. 2, emphasis supplied):

> Whether an employee has a right to statutory *liquidated damages* for non-payment of overtime . . . where, prior to either claim or suit therefor, the employer has voluntarily paid the full amount of such overtime and the employee has given a release of any such additional liability.

The Solicitor General's error may result from his attempt to frame a single question to embrace both this case and No. 554.

(b) Secondly, the Solicitor General states as a major premise of his entire argument that (Br. 10):

> Any contract, whether by way of release or otherwise, whereby an employee is to receive less than the amounts prescribed in [Sections 6 and 7] is illegal.

If this statement is meant to include both settlements and mere waivers, it is erroneous. Of course, no employer may enter into a contract with an employee requiring the latter to waive minimum wages or overtime—because that would plainly be a use of contract to avoid the statute entirely. But that does not and cannot mean that—where there is a dispute of fact or of law—the parties may not in a particular case settle or compromise a claim for statutory wages or overtime; for otherwise parties would be put to the expense of litigation for the determination of every dispute.

Even where the dispute involves statutory minimum wages or overtime, there must be adjustments. The Solici-

tor General does not deny that the Administrator makes such adjustments; and in the nature of things the Administrator must necessarily settle, or arrange settlements, of cases in which the number of hours, the coverage, employment, or other factors are in dispute. It is unreal to say that there may be no settlement for less than 100% of the statutory wages or overtime, for in some cases these cannot be determined. It is therefore a purely theoretical assumption for the Solicitor General to say, as he does at page 19 of his brief, that in Government settlements "the wages due are of course always paid"—because that statement can be true only if it is assumed both that "wages due" can in all cases be determined with nicety, precision, and absolute perfection of truth, law, and fact in every case and that liability is always clear or to be assumed.

III

Both respondent and the Solicitor General draw erroneous conclusions from this Court's limitation of review to the factual situation presented.

This Court granted the petition "limited to the second question presented by the petition for the writ" (R. 83). That question was (Pet. 2):

> 2. Whether upon such payment a release of any such additional liability does not bar recovery of such damages.

The word "such", which is used twice in the question, referred to the first question, which reads:

> 1. Whether employees have any right to sue for statutory liquidated damages for non-payment of overtime * * * where the employer prior thereto has voluntarily paid the full amount of such overtime.

The question upon which certiorari is granted, therefore, is correctly stated at page 2 of petitioner's brief on the merits

and quoted in point II, *supra*. (Petitioner has assumed that this Court in limiting the review to the second question meant to confine the parties to a payment case in which a release had been taken—that is, to confine the parties to the factual situation presented.)

In this situation, respondent concludes that petitioner has improperly amalgamated questions one and two of the petition (Resp. Br. 5) and that no question of an agreed settlement or "accord" is involved but "merely the question of legal sufficiency of a release" (pp. 5-6, 26). Clearly, however, the second question of the petition expressly refers to a situation in which there has been full voluntary payment of overtime claimed, before the institution of a suit for liquidated damages. Clearly, this Court did not grant certiorari to review merely the documentary sufficiency of the release as a matter of form, but granted the writ to determine whether the statute interposed any bar to settlements in cases in which the employer paid an overtime claim and the employee gave an unequivocal renunciation of any further liability.

The Solicitor General takes a much different position. He assumes that "mere payment of the unpaid wages does not abrogate the liability for liquidated damages" (Br. 11, 13, and note 15). But it is perfectly plain that this broad generality confuses at least four different factors or kinds of situations: (1) the time of payment, (2) the presence of an accord of the parties, (3) unilateral restitution by the employer, and (4) administrative enforcement. In each of these, different questions are presented:

(1) There may be cases where payment of wages is reasonably delayed, either because of doubts of coverage or hours, mistake, or for other reasons. The Solicitor General admits that "the Act does not specify a time for payment" and that payment alone might be sufficient to preclude

liability for damages "if not unreasonably delayed" (Br. 13 and note 14). Here there was mutual acquiescence in the delay, there was a voluntary payment by the employer upon the possibility of coverage, and there was and remained a dispute as to the factual basis for coverage. All of these facts are fully developed under the final heading of this brief (see point V *infra*). It is petitioner's position that, under these circumstances, there was here no unreasonable delay.

(2) The second situation in which payment of statutory wages or overtime may be made is one in which the parties in some manner manifest an intention to preclude all further liability. This may obviously be done by various methods—including a stipulated judgment such as this Court itself entered in Nos. 345 and 346 at the present term. An express release is manifestly a clear and unequivocal method of stating the intention of the parties, as presented by the facts of this case. In short, the function of a release is to show intent, although we may quite safely assume that it is not the sole means of doing so.

(3) The third situation is one in which the employer has made full restitution, but there is nothing except the employee's acceptance to show intent of the parties to thus conclude all disputes and all liability. The Solicitor General assumes to cover the situation even though here the employee, in addition, gave an express release on receiving payment. Should the Court consider the situation of simple payment and acceptance, the following factors which are overlooked in the Solicitor General's brief may well be considered: The statute provides liability for damages upon suit for "unpaid" wages or overtime and makes no mention of suit for liquidated damages alone—thus predicating liability for damages upon the necessity

of an employee's suit for failure of payment of the statutory wages or overtime. That Congress so understood it appears unequivocally from the legislative history, despite the Solicitor General's insistence that it is not "of any assistance" here (Br. 14). A member of the Conference Committee stated on the floor (83 Cong. Rec. 9264, emphasis supplied):

> If there shall occur violations of either the wages or hours, the employees can themselves * * * maintain an action in any court to recover the wages due them and *in such a case* the court shall allow liquidated damages * * *

And the Conference Report itself states that the employee may recover (83 Cong. Rec. 9255)

> twice the amount by which the compensation he should have received exceeds that which he actually received.

The Administrator has so construed the statute in his annual reports:

> Section 16(b) confers upon employees an independent right to sue for legally earned but unpaid minimum wages or overtime compensation and, *if successful*, to recover an equal amount in liquidated damages, as well as court costs and a reasonable attorney's fee. (Annual Report, 1941, p. 98, emphasis supplied; and see 1940, p. 146.)

The Solicitor General concedes that the Administrator engages in office settlements excluding liquidated damages, without any formal release of further liability, in which the parties "probably anticipate that the settlement upon which they agree will in practical effect be final" (Br., p. 18).

(4) In still another situation full payment alone without more at least raises a serious question. Section

17 authorizes the Administrator to secure injunctions to force compliance. In these cases he is authorized only to secure compliance with Sections 6 and 7 relating to unpaid wages or overtime. In these cases he secures judgments, including restitution of unpaid wages or overtime, either after contest or upon consent. The employees are thus, by the Administrator's action, made whole but are not paid liquidated damages. It is not a unilateral restitution, and the employee has been put to no expense for litigation. Do employees thereafter have a right to bring actions for liquidated damages although their unpaid wages or overtime have been paid? If so, Congress has provided two actions in place of one and has placed upon employees the burden of further litigation where the issues have once been reduced to judgment. If that is the situation, then the member of the Conference Committee erroneously informed Congress, when the bill was under consideration, that it was "both a common sense and economical method of regulation" (83 Cong. Rec. 9264).

There are, in addition, office cases in which the Administrator procures or participates in securing payment of wages or overtime without suit. These are not unilateral. In these cases the Administrator may actively participate in the settlement, as in the instant case (see note 3 *infra*). The employee has been put to no expense of litigation, nor is he required to employ counsel. This situation is fully set forth under the last heading of this brief (see point V(a) *infra*).

IV

Respondent's contention that the liquidated damages are "indivisible" ignores the statute, legislative intent, admin-

istrative interpretation, and practicalities of employer-employee relationships.

Respondent's argument is that, assuming statutory wages and overtime are not subject to waiver or release (see point II *supra* and see Resp. Br. 8-18), liquidated damages are not subject to settlements because wages or overtime and liquidated damages are one "entire and indivisible liability" which is a "single right" (Resp. Br. 20-21). Pursuing this theory, respondent takes sharp issue with petitioner's reference to "base liability" in the form of unpaid wages or overtime (Resp. Br. 22). But the Solicitor General distinguishes between the "base requirements" (Br. 11 note) or the "base liability" (Br. 17) and admits that "the primary purpose of the statute is to insure compliance with Section 6 and 7" relating to minimum wages and overtime compensation but not to liquidated damages (Br. 16-17). From these two different points of view, the Solicitor General and the respondent reach the following different results:

The Solicitor General, having had no difficulty in asserting that the "base liability" could not be waived (see point II *supra*), finds settlement waiving liquidated damages to be a "much more troublesome and difficult question" (Br. 11) because the statute "is not very explicit on the point" (Br. 12) and hence "not very helpful" (Br. 14). The Solicitor General then finds that a settlement, under proper circumstances, may include a waiver of the statutory liquidated damages (Br. 23-24).[2] If there is no statutory

[2] Resorting to "the general policy embodied in the Act" (Br. 14), the only consideration the Solicitor General finds against the validity of settlements waiving liquidated damages is that the latter are designed as compensation for delay. In suggesting this argument he assumes that the separate provision for attorney's fees and costs takes care of all expenses of litigation—which is contrary to fact as every litigant knows—and also assumes that the employee's wages are entirely withheld so that he has been "unable to pay bills, or insurance premiums, or payments on his

impediment to a settlement, on general principles of law and legislative practice (Pet. Br. 13-16) there can be no ground of objection. If Congress desired to penalize delay by an irrevocable liability, it was for it to do so as it has in one statutory instance (Pet. Br. 11). If Congress deemed the facts such as to make it necessary to protect employees against the possibility of improvident settlements, it was for it to do so by appropriate provision as it has done in certain other statutory instances (Pet. Br. 14) and it is not for courts and lawyers to assume facts and remake the laws. So far as the liquidated damages are a "deterrent" of violations, to place them beyond the pale of settlement will only intensify and prolong litigation rather than promote payment of the basic liability (Pet. Br. 17-19).

The respondent—upon the theory of "indivisible" duty to pay both statutory wages or overtime and, in cases of any delay, liquidated damages as well—seeks to make liquidated damages something as special as wages and not settleable under any circumstances. Here respondent relies on *Overnight Motor Transport Co.* v. *Missel*, 316 U.S. 572, 581-

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home when due" (Br. 15). Thus, argues the Solicitor General, "insurance or property may be lost, or credit impaired, or he may be unable to incur medical expense for himself or his family when needed" (Br. 15). But these arguments are unreal in this case because the employee regularly received his full wages pursuant to collective bargaining agreements (R. 7-8), never reckoned himself as entitled to the additional overtime later voluntarily paid him (R. 15, 17), had left the employment two and a half years previously, and hence received a windfall rather than his demand after struggle and privation. The Solicitor General imports another factor into this argument by asserting that the "economic inequality between employers and employees * * * aggravates these consequences" (Br. 15) because it allegedly causes employees to accept any settlement proffered them in order to meet "pressing needs" (Br. 16). But in making this latter portion of the argument, the Solicitor General departs from the compensatory view of the liquidated damages and frankly considers them as serving "to effectuate the policy of the statute by discouraging violations" (Br. 16) and thus supplying a "deterrent effect which Congress plainly intended that Section 16(b) should have" (Br. 16). To these arguments the answers are plain, as set forth in the text.

582 (Resp. Br. 2-3, 7-8), which held that, after judgment in litigation to recover unpaid minimum wages or overtime, the court has no authority to mitigate or remit the liquidated damages provided. But that was laid down in a case where there was no payment of the basic liability, no release of any additional liability, and the employee was compelled to litigate his right to the base liability.

There are other conclusive answers to respondent's position. *First*, Section 16(b) does not purport to make damages inseparable but, instead, provides for them only if an employee is compelled to bring an "action to recover such liability" for liquidated damages (Section 16(b)). Section 6 says that an employer "shall pay" the prescribed minimum wages and Section 7 says that no employee may labor more than the prescribed minimum hours "unless such employee receives compensation" therefor "at a rate not less than one and one-half times the regular rate.". But the employer is not so directed to pay liquidated damages; Section 16(b) merely makes him "liable" for them in the statutory employee's action. Section 16(b) makes no provision for suit for damages without unpaid wages or overtime, because the damages are to be no more than an amount "equal" to the unpaid wages or overtime sued for. *Secondly*, the statute as a whole specifically treats liquidated damages as something separate and secondary. The Administrator's statutory injunctions under Section 17 do not include anything more than the unpaid wages or overtime. Criminal penalties do not apply to non-payment of liquidated damages. *Thirdly*, the administrative practice in settling cases does not require the payment of liquidated damages (Pet. Br. 18 note; Gov't Br. 17-20). *Fourthly*, the administration of the law will be made more difficult if cases may not be settled for less than 200% of the base liability (Pet. Br. 17-20).

V

The Solicitor General, conceding the propriety of releases of liquidated damages but contending that the release here is unlawful because of the circumstances under which it was given, injects issues into the case which were not presented below and are based on assumptions contrary to fact.

The Solicitor General, while conceding that there may be settlements waiving liquidated damages (Br. 23-24), contends that the release here is unlawful because (a) obtained through "overreaching" and (b) not founded upon the consideration of a bona fide dispute between the parties. But—in their bearing on the lawfulness of the release—these are new issues, not presented, determined, or the expressed ground of any of the decisions below. They are therefore not proper issues here. Petitioner has had no opportunity to present the facts for the record. Assuming, however, that these are proper issues at this time, the record—aided by judicial notice of public records (*Jones* v. *United States*, 137 U.S. 202, 216; *Underhill* v. *Hernandez*, 168, U.S. 250, 253; *Fletcher* v. *Jones*, 105 F. 2d 58, 61-62, cert. denied 308 U.S. 555; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. 2d 308, 312)—completely refutes the factual basis of the issues so raised by the Solicitor General.

(a) *The alleged "overreaching" by petitioner in securing the release is contrary to fact.*—Respondent's brief merely asserts, without attempting to rely upon the fact in argument, that respondent was not advised of his rights to liquidated damages (Br. 3) and, as heretofore stated, respondent expressly disclaims any issue as to an accord and satisfaction (Br. 5-6, 26) and simply argues that liquidated damages cannot be released at any time, under any circumstances, for any purpose. The Solicitor General attempts to establish it as a fact that the unionized employee was not informed of his rights (Br. 5 note 3 second ¶, and 20-21).

That is a fact which, if in issue at all, was for the trial judge who heard the witnesses to determine; and on familiar principle he must be conclusively presumed to have found the facts to be those supporting his judgment dismissing respondent's complaint (R. 51). If it was an issue, "in the absence of findings of fact to the contrary, it is to be presumed that all things necessary to make * * * the release valid were done regularly" (*Klamath Indians* v. *United States*, 296 U.S. 244, 253). Moreover, the record amply supports such an implied finding. The representative of petitioner who paid respondent and secured the release from him testified that he "explained the nature of the paper that would have to be signed" (R. 42) and "showed him the release and told him its contents" (R. 47). The trial court itself elicited the witness' testimony that he explained the release as one completely disposing of "all claims that he might have" (R. 50)—although respondent later denied that he had been told that the release was a complete one (R. 51). But respondent could read the English language (R. 17), the release was shown to him (R. 47), and he did not testify that he was "not aware of his right to an amount in excess of the unpaid wages" as the Solicitor General erroneously assumes (Br. 20). Upon this state of the record, in view of the issues presented, and since "the burden was on plaintiffs to prove the absence of a valid release" (*Klamath Indians* v. *United States*, *supra*, p. 252), the trial judge was certainly justified in drawing his own conclusion as to the fact of full discussion and explanation of the release. The only appellate judge who mentions the point says that (R. 66): "The plaintiff accepted the check and signed a general release, after that paper had been explained to him."

Next the Solicitor General erroneously assumes that "petitioner computed the statutory overtime compensation due" (Br. 4, 22). The Solicitor General therefore contends that "a distinction may be drawn * * * between situations

where the employee's interests were safeguarded by * * * a government agency, and situations in which dealings took place directly with the employee himself" (Br. 20)—the former being such a situation as would (in the Solicitor General's view) validate the release and the latter constituting "an overreaching not compatible with the statute" (Br. 20): *But the fact in this case was that the Government agency did actually compute the wages due and took an active, routine, and formalized part in the transaction.* If there was a failure to advise the employee of rights, it was because the participating agency chose neither to advise the employee nor to have petitioner do so.[3]

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[3] Although it does not appear in the record because not an issue at the trial, the fact was that petitioner's representatives conferred with the Administrator's regional office on the method of making payments and secured from the Administrator Form CI-31A entitled "SUMMARY OF UNPAID WAGES UNDER THE FAIR LABOR STANDARDS ACT OF 1938 AND EMPLOYEES' ACKNOWLEDGMENT OF PAYMENT," which are legal-size forms containing columns for signatures of employees, their occupation and address, and the amounts due them. This form was filled in by petitioner, then submitted to the Administrator together with the work sheets for checking. These work sheets were required to be submitted with a covering affidavit on Form CI-31B certifying to their accuracy and stating that:

> If this statement is accepted by the Wage and Hour Division, the undersigned firm agrees to make immediate restitution of the amounts computed in accordance with the requirements of the Fair Labor Standards Act.

Thereafter Form CI-31A, after approval by the Administrator, was returned to petitioner. Upon it the petitioner was required to secure the signature of each employee upon making payment. At the top of these forms appears the following:

> We, employees or former employees of the above establishment, by affixing our signatures hereto, acknowledge the payment of the amounts shown opposite our respective signatures, such amounts being unpaid wages as computed or approved by the Wage and Hour Division under the Fair Labor Standards Act of 1938 and covering the period or periods of employment from October 24, 1938 to

In this case the last blank had "September 12, 1942" filled in. (It should be noted that the Administrator's form carefully refrains from notifying either the employees or the employer that there is any possibility of additional liability in the way of liquidated damages. *Cf.* Gov't Br. 20-21.)

Curiously enough, the Solicitor General takes the position that, because in settlements handled by the Department of Justice "the employees' interests were safeguarded by counsel," they are proper (Br. 20). There the employees are required to do the following things which respondent here did not have to do—make demands, secure counsel, institute suit, and convince several government agencies that they "should prevail" (Br. 19)—so that they are put to burdens which might require damages not sustained in the instant case. Moreover, the Solicitor General admits that the presence of counsel does not alter the practical situation because "almost invariably the employee's counsel is willing to accept considerably less than the total amount of liquidated damages" (Br. 19). Indeed, since the Solicitor General makes no mention of payment of attorney's fees, presumably employees' counsel must be paid out of the settlement and hence employees may net less than the full restitution afforded respondent. Thus the settlements negotiated with the Department of Justice may leave the employees with less than respondent received with no suit or other effort in the instant case. Furthermore, nowhere does the Solicitor General say that in these cases the employees are informed of their rights to the mandatory liquidated damages in cases of employee's suits as held by this Court in *Missell* v. *Overnight Transportation Co., supra.*

But this was not all, for by letter dated October 14, 1942, petitioner was formally advised as to the procedure and directed to obtain also individual receipts from the employees in the form set forth in note 12 on page 18 of petitioner's brief on the merits. Respondent executed both of these forms. During the conference with the administrative officers, petitioner also showed them the form of release which appears in the record (R. 7-8) and was told that there was no objection; and respondent, as the record shows, also executed that form. It is notable that no official document even suggests that there is any liability for liquidated damages after such payment, much less requesting the employer to so advise employees or to be so advised.

Finally, respondent manifestly knew that he was called upon to surrender something when presented with the release for signature. It is wholly unfair to demand—as the Solicitor General apparently demands—that the employer represent and concede that the employee "is *entitled* to more than the back pay which the employer is offering him" (R. 16) or that he had a "*right* to an amount in excess of the unpaid wages" (R. 20-21) when there were questions as to coverage, as to liability for either back pay or for liquidated damages, and as to the amount due. There was, and we think there still is, a question of law as to whether voluntary payment alone would not extinguish any right to liquidated damages (see point II, *supra*); and neither the Administrator nor any court at the time had taken any contrary position, nor had this Court ever held the contrary. In the next and final point of this brief the nature of the question of coverage is fully set forth. Moreover, here at the time of payment—although the record does not show it since not an issue at the time of trial—petitioner as a bank had first been nothing more than a mortgagee in possession, later owner (R. 6), and was faced with liability predicated upon uncertain facts existing several years previously and subsequently changed (R. 45). It soon disposed of the property. In these circumstances—particularly in the light of the issues of law and fact next presented in the final point of this reply brief—no one could reasonably demand that the petitioner confess additional liability on making payment where he either did not believe there was any such additional liability or doubted it.[4]

[4] The law as stated by this Court has always been that representations as matters of law are matters of opinion upon which no liability may be predicated. *Upton* v. *Tribilcock*, 91 U. S. 45; *Mutual Life Insurance Company* v. *Phinney*, 178 U. S. 327.

(b) *The assumed lack of a "dispute" or "consideration" ignores the facts and the law.*—Here there were several disputes. One was coverage. Another was the amount of overtime. Another was whether payment alone would not set at rest incipient liability for liquidated damages.

(1) The Solicitor General, citing the greater part of the testimony *en masse*, asserts that "a substantial portion of [the] building [in which respondent had been employed] was devoted to the production of goods for interstate commerce" (Br. 3-4) and thereafter merely assumes that it was "occupied by producers of goods for commerce" beyond "any dispute" (Br. 21-22). Both respondent (Br. 2) and the Solicitor General (Br. 21) assume that any dispute in this case had been laid at rest, prior to the payment and release, by the decision of this Court in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, which—the Solicitor General says—"clarified the law on coverage of maintenance employees in buildings occupied by producers of goods for commerce." But one dispute here was whether the building at which respondent served *was* "occupied by producers of goods for commerce."

More properly, there was a dispute as to whether, in the words of the *Kirschbaum* case (p. 519), the tenants of the building at the time of the respondent's employment were "principally engaged in the production of goods for interstate commerce." The *Kirschbaum* case did not establish coverage as the Solicitor General assumes (R. 22) but merely the sufficiency of the relation of building service employees to production—as later emphasized by this Court in *Walton* v. *Southern Package Corp.*, 320 U. S. 540. The question here, on the other hand, was whether there was production in the building, whether it was for interstate commerce, and whether it was the principal activity in the building.

The situation is much the same as in *North Shore Corporation* v. *Barnett* and same v. *Scott* where this Court in *Overstreet* v. *North Shore Corporation* had first found the necessary proximate relation of employment to interstate transportation (318 U. S. 125). Thereafter the fact of substantial interstate transportation was unsuccessfully contested (143 F. 2d 172), whereupon this Court granted certiorari (Nos. 345 and 346, October 9, 1944). This Court then permitted the parties to have a consent judgment entered reducing the recovery to two-thirds of the judgment for statutory wages and liquidated damages (see the Journal entries for December 11, 1944). There the mere prior establishment of the employment relation to commerce did not conclude the issues of coverage, as this Court's subsequent grant of the petitions for certiorari in Nos. 345 and 346 demonstrates. The entry of a consent judgment was also a settlement, protected as *res judicata*—unless all settlements are outlawed as respondent contends and the employees are in that case at liberty to have the consent judgment reopened.

The dispute in the instant case relates to the nature of the business done in petitioner's building some years prior to the payment and release. A false cast is placed upon the nature of that question, because respondent long subsequently precipitated a trial of the issue. It is true that respondent prevailed on this issue in the appellate courts below, but he did not prevail in the trial court. The fact that petitioner did not deem the factual question of such general importance as to warrant asking this Court to review it (Pet. 5; Pet. Br. 5) certainly does not negative the bona fides of the original dispute. "Dispute" does not mean that the party relying upon it must be correct, or must ultimately prevail in subsequent litigation on the point. Petitioner might not have litigated the issue at all,

relying instead solely upon the validity of the release. Respondent had the burden—if there was any such issue raised at the time—to show that *neither of the parties at the time of the settlement* had a bona fide question of law or fact as to liability. That the employee was unassertive certainly cannot preclude the employer from settling liability—as the Solicitor General argues (Br. 22).

However, it is apparent from the record not only that there was a real dispute as to coverage but that the decisions of the appellate courts below on coverage are erroneous. The Solicitor General mistakenly insists that "the record in this case admits no doubt that the employee was covered by the Act" (Br. 4 note 1). At the trial successfully, and in the appellate courts below unsuccessfully, petitioner contested coverage. Respondent called several employees and one tenant who testified that nine of the twenty-seven tenants of the building (R. 46) dealt in goods which in some part came from outside the state or might be sent beyond the state (R. 18-50). Apart from the lack of qualification of such witnesses to testify as to the nature of the business (R. 18-21, 24, 35, 37-38) and their failure to identify the period for which they spoke (R. 41), none of them testified that the tenants were engaged in substantial *production* for interstate commerce. There was insufficient evidence for coverage either as to goods received or goods sold. As to goods received, the statute applies only to "employees * * * engaged *in* commerce"; and the coverage sustained in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 574-575, is inapplicable because it involved a rate clerk of an interstate bus company. There was no evidence of special orders warranting the coverage sustained in the first two situations discussed in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 566-569; but the instant situation falls rather within the third situation, namely, that "evidence of a wholly general character * * * lacks that

particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local distribution" (p. 570). *Cf. Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, 574. The Solicitor General's reference to one tenant's importation of a large part of its goods from outside the state (Br. 4 note 1) is entirely immaterial because respondent was not engaged "in" commerce but was merely a business building watchman. *McLeod* v. *Threlkeld*, 319 U. S. 491. As this Court said in the latter case (p. 497), "employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, "production of goods for commerce". This leaves as the sole relevant question of fact whether in petitioner's building the tenants were principally engaged in "production of goods for [interstate] commerce". In order that respondent be covered by the Act it was necessary—and the case was tried on the theory (R. 18-50)—that he be engaged in an "occupation necessary to the production" (Section 3j) "of goods for [interstate] commerce" (Section 7), as this Court held in the *Kirschbaum* case (pp. 524-525). To find such coverage of respondent the Solicitor General asserts that gloves were manufactured on the premises but one witness cited does not identify what portion was shipped interstate but merely that gloves were sold "inside and outside the State of New York" (R. 24) and the other admittedly "never did any actual manufacturing of these goods at the premises" (R. 34). The only other witness cited by the Solicitor General was a truck driver (R. 19) of a tenant company which he admitted "was engaged in the business of buying and selling furniture" (R. 18) and did a "wholesale business" (R. 19). While he testified that a good portion of its sales "went to New Jersey or Connecticut" (R. 19), his testimony established that there was no manufacturing of furniture by the company but that its goods were purchased from

Grand Rapids and other furniture manufacturing centers (R. 18) and the company merely "assembled" or sprayed or "colored" some of it (R. 20). The basement of the building was used to store furniture (R. 22). Moreover, the building leases contained covenants against manufacturing (R. 44-45) which were enforced (R. 43). Subsequent to respondent's employment the ban on manufacturing was lifted and the nature of the tenancies changed (R. 45). Hence, on all the evidence, the trial judge had at least ample ground to find a lack of manufacturing and therefore a lack of coverage as to a service employee such as respondent. Certainly this evidence fails to establish coverage of the building, and hence of service employees, under the terms of the statute here involved. Even if by some indulgence it could, the evidence still demonstrates the bona fides of the dispute and the questionable coverage of the Act in this case.

(2) The respondent assumes that the amount petitioner paid respondent was "concededly earned" (Br. 2-3) and the Solicitor General assumes that the amount so paid was "due" (Br. 4). But these assumptions seek to make capital out of the settlement by taking the payment as a sort of admission against interest, contrary to the usual and familiar rule necessary to protect parties and make settlements possible. The claim here is predicated upon an alleged failure to pay overtime as earned some two years before the institution of the present suit. The respondent had long since left petitioner's employ. The computations were made by petitioner and the Administrator. It does not appear whether the Administrator advised with respondent. As to the computations, the record shows nothing as to negotiations between the Administrator and petitioner in arriving at the final figures. Nothing is shown as to the contentions or concessions made by either. Since the computations related to overtime, there were naturally ques-

tions as to the number of hours worked each week as they fluctuated from week to week, allowances for holidays, days off, and the amounts previously paid and changes made in rates of pay under collective bargaining agreements during the period. All of these related to a period of about two years ending over two years prior to the time the settlement figure was agreed upon. There had previously been no statement or settlement of accounts between the parties, so that the amount in issue had never been liquidated. "Any payment received in full satisfaction of an unliquidated or disputed claim is sufficient consideration." Williston, Contracts, Rev. Ed. 1936, § 128, p. 437.

The Solicitor General, however, apparently unaware of the Administrator's part in the transaction, deems it significant that the employer did not argue with respondent when making the payment and argues that "voluntary payment * * * is quite inconsistent with the existence of an 'active controversy'" (Br. 22; note 3, second ¶). But surely the law cannot require, as the price of a valid settlement, a demonstration of haggling in the fashion of the market place. There was little if any practical room for such argument at the time of the payment because the sums had been arrived at through the administrative process provided by the Administrator and presented to respondent upon official forms officially approved as to their contents (see note 3, *supra*). Moreover, the record shows that there was some discussion at the time of payment (R. 50). As this Court has said, "in this case it cannot be said that at the time the release was executed there was no good reason to doubt that these items were open to dispute" (*Chicago, Milwaukee, &c. Ry. Co.* v. *Clark*, 178 U. S. 353, 367) so that there was ample basis to support a settlement and release of all further liability.

(3) There was also a question of law as to whether, under the circumstances, the petitioner might be subject to lia-

bility beyond restitution of statutory overtime. There was a question whether voluntary payment alone would not extinguish any liability for liquidated damages, attorney's fees, or costs (see point III(3), *supra*)—and neither the Administrator nor any court had taken the position that it did not do so. There was thus a question of law as to whether petitioner, if liable because of coverage of the statute, was liable for unpaid overtime or for twice that amount. There was a question whether the Administrator's intervention in the settlement might not deprive the employee of any right to suit for any additional liability (see point III(4), *supra*). Amid all these unsettled questions, there surely was room for the parties to make a settlement such as they did here. Even if some portion of the claim were concededly due, there were other liabilities in question, petitioner was called upon to concede coverage by making restitution, and therefore a release of any further liability will be sustained.

> The cases are many in which it has been held that where an aggregate amount is in dispute, the payment of a specified sum conceded to be due * * * on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole. (*Chicago, Milwaukee &c. R'y Co.* v. *Clark*, *supra*, p. 367.)

In short, petitioner was called upon to alter its position—which was sufficient consideration for the release which it received in return.

(4) The issue presented below was solely whether the Act prohibits settlements as a matter of federal law (Pet. Br. 9 and note 4). The Solicitor General, however, has now imported the question of consideration into the case. Where federal statutes do not make contrary provision, the sufficiency of releases and other documents are tested by state law of the place where executed. State law generally favors releases upon slight or any consideration, and statutes fre-

quently deal with the matter. *Chicago, Milwaukee, &c. R'y v. Clark, supra,* pp. 365-366. Effective April 3, 1936, New York adopted Section 243 of the Debtor and Creditor Law which provides that—

> A written instrument, hereafter executed, which purports to be a total or partial release of all claims, debts, demands or obligations, or a total or partial release of any particular claim, debt, demand or obligation, or a release or discharge in whole or in part of a mortgage, lien or charge upon personal or real property, shall not be invalid because of the absence of consideration or of a seal.

The release which here appears in the record (R. 7-8) was obviously modeled upon this state of the local law and the parties in the case have never contended otherwise. The sole issue in this case is whether the Fair Labor Standards Act prohibits settlements in which there is a full payment of statutory overtime, voluntarily and prior to an employee's suit, with a release of any further liability for liquidated damages.

It is respectfully submitted that the decision below should be reversed and remanded with instructions to enter a judgment of dismissal.

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January, 1945.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK, Petitioner.

v.

WILLIAM J. O'NEIL, Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
ARGUMENT	5
I—There is here no novel, substantial or important question of construction of a Federal Statute not heretofore determined by this court, nor did the Court of Appeals of the State of New York decide this case in conflict with applicable decisions of this Court	5
II—This case was decided in complete harmony with applicable decisions of the various circuit courts of appeals and the highest state courts	6
A. On failure to pay overtime required under the Act at the time when earned in the regular course of employment, the employer immediately became liable to the employee in double the amount of the underpayment, and voluntary payment of the overtime years after it became due could not preclude recovery of liquidated damages	7
B. Considerations of paramount public policy dictate that an employee may not bargain away his right to recover any part of the sums due him under the Fair Labor Standards Acts	9
III—All constitutional questions invoked by petitioner have already been passed upon by this Court	11
IV—This court has already refused to grant a writ in a similar case despite similar arguments	12
CONCLUSION	12

Table of Cases.

PAGE

Abroe v. Lindsay Bros. Co., 211 Minn. 136, 300 N. W. 457 (Sup. Ct. Minn.) 7, 8

Birbalis v. Cuneo Printing Industries, 140 F. (2d) 826 (C. C. A. 7, 1944) 8, 10

Campbell v. Mandel Auto Parts, 31 N. Y. Supp. (2d) 656 (N. Y. Sup. Ct., 1942), aff'd, 264 A. D. 701 (N. Y. Sup. Ct. App. Div.) 10

Carleton Screw Products v. Fleming, 126 F. (2) 539, 541 (C. C. A. 8, 1942) 10

City of Glendale v. Coquat, 52 Pac. (2d) 1178 (Ariz.) .9

Clark v. State, 142 N. Y. 101 9

Crowe v. Liquid Carbolic Co., 208 N. Y. 396 9

Cudahy Packing Co. v. of Ala. v. Bazanos, 159 So. (2d) 720 (Sup. Ct. Ala. 1943) 10

Emerson v. Mary Lincoln Candies, 173 Misc. 531, 174 Misc. 353, aff'd 261 A. D. 879, aff'd 287 N. Y. 577 (Ct. App., N. Y.) 8

Fiedler v. Potter, 172 S. W. (2d) 1007 (Sup. Ct. Tenn., 1943) 10

Fleming v. Warshawsky & Co., 123 F. (2d) 622 (C. C. A. 7, 1941 10

Geo. Lawley & Son Corp. v. South, 140 F. (2d) 439 (C. C. A. 1, 1944), cert. den. ——U. S.——, May 11, 1944 (No. 908, Oct. 1943 Term) 8

Guess v. Montague, 140 F. (2d) 500 (C. C. A. 4, 1943 .8, 10

Hutchinson v. Barry, 44 F. Supp. 829 (D. Minn., 1942) 10
898 (D. Minn., 1943) 10

Johnson v. Dierks Lumber Co., 130 F. (2d) 115, (C. C. A. 8, 1942) 10

Kehn v. State of New York, 93 N. Y. 291 9

Kirschbaum v. Walling, 316 U. S. 517 (1942) 3, 11

Larsen v. Rice, 171 Pac. 1037 (Wash.) 9

Maryland Casualty Co. v. U. S., 305 U. S. 651 ..... 6, 9

Midstate Horticultural Co. v. Pennsylvania R. R. Co., ——U. S.——, 88 L. Ed. 83 (1943) 6

PAGE

McMahon v. Mayor, 22 A. D. 114 (N.Y. Sup. Ct.-App. Div.) 9
Montague's Adm'r. v. Massey, 76 Va. 307 9

Overnight Motor Transp. Co. v. Missel, 316 U. S. 572 ..... 3, 5, 8, 11

Pitt v. Board of Ed., 216 N. Y. 304 9

Rigopoulos v. Kervan, 47 F. Supp. 576 (S. D. N. Y., 1943), aff'd 140 F. (2d) 506 (C. C. A. 2, 1943) 10
Rigopoulos v. Kervan, 140 F. (2d) 506 (C. C. A. 2, 1943) 8
Rubin v. Meadow Provisions Co., 39 N. Y. Supp. (2d) 517-518 (N. Y. City Ct.) 10

Schneider v. Sports Vogue, 35 N. Y. Supp. (2d) 431 (N. Y. Sup. Ct. 1942) 10
Seneca Coal & Coke Co. v. Lofton, 136 F. (2d) 359 (C. C. A. 10, 1943 cert. den. 320 U. S. 772 ..... 8, 12
Strand v. Garden Valley Telephone Co., 51 F. Supp. 898 10

Tennessee Coal, Iron & R. R. Co. v. Muscoda Local No. 123, 321 U. S. 590 (1944) 9
Travis v. Ray, 41 F. Supp. 6 (E. D. Ky., 1941) 10

U. S. v. Darby Lumber Co., 312 U. S. 100 (1941) 9, 11
U. S. v. Morley Construction Co., 98 F. (2d) 781 (C. C. A. 2), cert. den. sub. nom. Maryland Casualty Co. v. U. S., 305 U. S. 651 ..... 6, 9

West Coast Hotel Co. v. Parrish, 300 U. S. 379 ..... 6, 9
Wilkinson v. Noland, 40 F. Supp. 1009 (E. D. Va., 1941) 10
Wood v. Horgan, 291 N. Y. 422 ..... 9, 11
Wright v. State, 223 N. Y. 44 9

IN THE

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OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK,

Petitioner,

v.

WILLIAM J. O'NEIL,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed the complaint without opinion after trial without a jury. The unanimous opinion of the Supreme Court of the State of New York, Appellate Term, reversing and directing judgment in favor of plaintiff, is reported in 180 Misc. 542 (R. 79-80). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, further affirming, appears in 267 App. Div. 317 (R. 90-102). The Court of Appeals of the State of New York handed down its unanimous affirmance on June 14, 1944. The per curiam affirmance, which indicates the questions passed upon, appears in 293 N. Y. 666.

Jurisdiction

The Court of Appeals of the State of New York—which is the highest court of the State in which a decision in the suit could be had—issued its remittitur on June 14, 1944 (R. 105). The final judgment of the Municipal Court of the City of New York, after filing of the remittitur, was entered on August 17, 1944 (R. 110). The petition for writ of certiorari was filed on September 8, 1944. Petitioner invokes jurisdiction of this Court under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

Petitioner has not, in its petition for writ of certiorari, specified a question with regard to whether respondent was an employee "engaged in commerce or in the production of goods for commerce." On the contrary, it has been conceded that petitioner does not ask this Court to determine the question of coverage (Petition for Writ, p. 5).

The questions presented, therefore, are:

1. Did appellant violate the Act in failing to pay respondent the overtime wages prescribed in Section 7 at the time when earned in the regular course of his employment?
2. Did restitution of the unpaid overtime several years after it was due preclude an action to recover liquidated damages based upon the underpayment?
3. Did the execution by respondent of a general release upon receiving his accrued unpaid overtime long after it was earned bar recovery of liquidated damages?

4. Does the imposition of liquidated damages, under the circumstances, deprive petitioner of property in violation of the Fifth Amendment to the Constitution of the United States?

The applicable statutory provisions are Sections 7 and 16 (b) of the Fair Labor Standards Act (52 Stat. 1060; 29 U. S. C. § 201 *et seq.*) set forth in an appendix to the petition for writ of certiorari (Petition for Writ, pp. 20-21).

Statement

Respondent was employed by petitioner as a night watchman at its commercial building, located in the City of New York, from October 24, 1938, the date when the Fair Labor Standards Act went into effect, to August 30, 1940 (R. 19). He brought this action under Section 16 (b) of the Act to recover the sum of $432.16 as liquidated damages resulting from the petitioner's retention for several years of an equal amount which respondent concededly earned as overtime under Section 7 of the Act during the period of his employ.

On June 1, 1942 this Court, in *Kirschbaum* v. *Walling*, 316 U. S. 517, held subject to the overtime provisions of the Fair Labor Standards Act night watchmen, such as respondent, employed in guarding against fire and theft commercial buildings housing tenants producing goods for interstate commerce. On June 8, 1942 this Court, in *Overnight Motor Transport Co.* v. *Missel*, 316 U. S. 572, held that an employer who has violated the overtime provisions of the act automatically becomes liable for "an additional equal amount as liquidated damages" under Section 16 (b) regardless of his good faith or alleged inability to determine that the Act applied, in view of the mandatory character of the statutory language. Thereafter, in Novem-

ber of 1942, long after plaintiff's employment had terminated, and long after the overtime compensation in question had been earned, petitioner paid respondent the sum of $423.16 concededly earned as overtime under the Act during the period he was employed (R. 23-25). At the time of making this payment, without advising respondent of its then existing liability for liquidated damages under Section 16 (b) of the Act, petitioner obtained from respondent a release "from any and all claims, debts, damages or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment" (R. 11-12, 54-55, 65-66).

On February 16, 1943 this suit was instituted to recover the unpaid liquidated damages. Respondent's right to recover has heretofore been affirmatively upheld upon three different appeals; upon each appeal the issues of fact and law, including the question whether plaintiff was an employee "engaged in the production of goods for commerce", together with all of the arguments presented at this time in support of the application for a writ, have been resolved against petitioner and in favor of respondent.

At least two statements in the petitioner's summary of the case in its petition require comment. It is said that "the tenants in the building here involved" were "not engaged in the production of goods" (Petition for Writ, p. 4); and further, that the case involves "the validity of accord and satisfaction" (Petition for Writ, p. 5). Petitioner's own failure to raise here the issue of whether the Act applied to respondent belies the first contention; further, both the assignment of questions presented in the petition and the certification of questions passed upon in the per curiam affirmance of the New York Court of Appeals and the remittitur clearly indicates the absence of any issue of accord and satisfaction.

ARGUMENT

I.

There is here no novel, substantial or important question of construction of a Federal Statute not heretofore determined by this court, nor did the Court of Appeals of the State of New York decide this case in conflict with applicable decisions of this court.

Petitioner must be denied certiorari in view of the fact that the decision of the Court of Appeals of New York was in accord with the previous decisions of this Court and involved no novel, substantial or important question not heretofore determined here. See *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572, holding payment of liquidated damages to be "mandatory", given coverage under the Act and neglect or refusal to pay overtime in accordance with the Act's requirements, "regardless of the good faith of the employer or the reasonableness of its attitude." As Mr. Justice Reed stated there, "'perplexing as petitioner's problem may have been; the difficulty does not warrant shifting the burden to the employee * * * the retention of a workman's pay may result in damages too obscure and difficult of proof or estimate other than by liquidated damages * * * nor can it be said that the exaction is violative of due process." There, as here, petitioner had pointed out that "if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act."

Nor does the incidence of a release here upon the making of what was in effect a partial payment of the entire sum due alter the result. This Court has many times held

that employees may not bargain away, waive or release the right to receive the full sums to which are entitled under mandatory provisions of remedial legislation establishing for their protection minimum wage and hour standards, enacted in the public interest. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *U. S.* v. *Morley Construction Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den, sub. nom *Maryland Casualty Co.* v. *U. S.*, 305 U. S. 651. This principle was only recently reaffirmed by this Court in *Midstate Horticultural Co.* v. *Pennsylvania R. R. Co.*,——U. S.——, 88 L. Ed. 83, where occasion was taken to point to the fact that "strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest" might move towards lending a forum to petitioner's plea of release, waiver or estoppel, may not avail against the rigid requirements of a statute designed for "securing the general public interest".

II.

This case was decided in complete harmony with applicable decisions of the various circuit courts of appeals and the highest state courts.

There is no divergence of authority in the various circuit courts of appeals and in the highest courts of other states upon the questions passed upon here by the Court of Appeals of New York. The decision of the latter court was, in fact, in keeping with innumerable authoritative decisions of various circuit court of appeals and highest state courts.

A. On failure to pay overtime required under the Act at the time when earned in the regular course of employment, the employer immediately became liable to the employee in double the amount of the underpayment, and voluntary payment of the overtime years after it became due could not preclude recovery of liquidated damages.

Examination of the language of Section 16 (b)* of the Act, upon which this cause is founded, together with the interpretation of the Administrator of the Wage and Hour Division, charged with the Act's enforcement, and the decisions of the courts, compels the conclusion that the employer, upon failing to pay overtime required by Section 7 of the Act at the time when earned, in the regular course of employment, immediately became liable to the employee in double the amount of the underpayment.*

Liquidated damages are clearly an integral part of the employee's right and the employer's concomitant liability, and not merely an appendage to assertion of the remedy. *Abroe* v. *Lindsay Bros. Co.*, 211 Minn. 136, 300 N. W. 457 (Sup. Ct. Min.). This result is indicated by the Administrator's interpretation of he Act's requirements. In Interpretative Bulletin No. 4, the Administrator states his opinion that "the Act takes a single workweek as its standard" and that "overtime compensation due an employee must be paid in cash and normally at the time of the regular pay period and may not be accumulated to be paid at any time subsequent thereto." See paragraph 29 of Interpretative Bulletin No. 4, Wage and Hour Manual, 1942 Edition, p. 111. And see Section 196 of the New York State Labor Law which requires that "every person

* "Any employer who violates * * * shall be liable to the employee or employees affected in the amount of * * * unpaid overtime compensation * * * and in an additional equal amount as liquidated damages."

carrying on a business * * * shall pay weekly to each employee the wages earned".

Accordingly, the only reasonable construction of Section 16 (b) is that it creates a cause of action in double the amount of unpaid compensation immediately upon failure of an employer to pay overtime as required by Section 7 contemporaneously when earned, at the end of the current pay period. That this construction is the proper interpretation of the congressional intention is indicated by the great unanimity with which the highest courts, both state and Federal, have accepted it. *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572; see also *Emerson* v. *Mary Lincoln Candies*, 173 Misc. 531, 174 Misc. 353, aff'd 261 A. D. 879, aff'd 287 N. Y. 577 (Ct. App., N. Y.); *Abroe* v. *Lindsay Bros. Co.* 211 Minn. 136, 300 N. W. 457 (Sup. Ct. Minn.).

Five different Circuit Courts of Appeals have recently indicated that Section 7 is violated, and a cause of action in double the amount of the underpayment accrues to the employee, immediately upon the employer's failure, even in good faith, to pay the required overtime currently, at the time when earned in the regular course of employment; and post-payment of the past-due overtime leaves the employee with a right of action to recover the liquidated damages still remaining unpaid. *Geo. Lawley & Son Corp.* v. *South*, 140 F. (2d) 439 (C. C. A. 1, 1944), cert. den. U. S. , May 11, 1944 (No. 908, Oct. 1943 Term); *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2, 1943); *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943); *Birbalis* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), cert. den. 320 U. S. 772.

B. Considerations of paramount public policy dictate that an employee may not bargain away his right to recover any part of the sums due him under the Fair Labor Standards Act.

It has long been recognized that employees may not bargain away, waive, release or compromise the right to receive the full sums to which they are entitled under the mandatory provisions of remedial, social legislation enacted for their protection in the public interest. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *U. S.* v. *Morley Construction Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den. sub. nom. *Maryland Casualty Co* v. *U. S.*, 305 U. S. 651; *Larsen* v. *Rice*, 171 Pac. 1037 (Wash.); *City of Glendale* v. *Coquat*, 52 Pac. (2d) 1178 (Ariz.); *Montague's Adm'r.* v. *Massey*, 76 Va. 307; *Kehn* v. *State of New York*, 93 N. Y. 291; *Wright* v. *State*, 223 N. Y. 44; *Clark* v. *State*, 142 N. Y. 101; *Pitt* v. *Board of Ed.*, 216 N. Y. 304; *McMahon* v. *Mayor*, 22 A. D. 114. (N. Y. Sup. Ct.-App. Div.).*

There can be no question of the remedial and humanitarian character of the Fair Labor Standards Act and the fact that it is pregnant with the public interest. See *Section 2 of the Act* and *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100 (1941); *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123*, 321 U. S. 590 (1944). The same principle, therefore, has been regularly applied in cases involving the Fair Labor Standards Act and the courts have repeatedly struck down as inconsistent with the public interest agreements by employees to accept less than the full amounts which the Act gave them the statutory right to demand, as due them under the statute's mandate.

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* It is fundamental that a waiver or release of protective rights which is inconsistent with the public policy which the legislative act manifests is no less invalid because the enactment involved contains no expressed prohibition against the waiver of the statute's benefits. *Crowe* v. *Liquid Carbolic Co.*, 208 N. Y. 396; *Wood* v. *Horgan*, 291 N. Y. 422.

Fleming v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7, 1941; *Birbalis* v. *Cuneo Printing Industries, Inc.*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Johnson* v. *Dierks Lumber Co.*, 130 F. (2d) 115 (C. C. A. 8, 1942); *Carleton Screw Products* v. *Fleming*, 126 F. (2d) 539, 541 (C. C. A. 8, 1942); *Rigopoulos* v. *Kervan*, 47 F. Supp. 576 (S. D. N. Y., 1943), aff'd 140 F. (2d) 506 (C. C. A. 2, 1943); *Cudahy Packing Co. of Ala.* v. *Bazanos*, 159 So. (2d) 720 (Sup. Ct. Ala. 1943); *Fiedler* v. *Potter*, 172 S. W. (2d) 1007 (Sup. Ct. Tenn., 1943). A multitude of lower court decisions, both Federal and state, have recognized the soundness of this rule, as applied to the Fair Labor Standards Act.*

Nor may it properly be urged that there is a conflict between decisions of the circuits on this point. *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943), relied upon by petitioners as indicating such conflict, involved the question of an accord and satisfaction based upon a settlement or compromise of a purported dispute as to whether the Act applied. This case involved no such dispute, nor was there here any kind of settlement or compromise, but merely a voluntary part payment by petitioner of less than the full amount mandatorily due respondent under the Act. The plea of accord and satisfaction, settlement, or compromise of a genuine or bona fide dispute has neither been pleaded nor proved. The answer at bar merely pleads naked release or waiver by the employee in consideration of receiving payment of his back overtime (R.

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* *Hutchinson* v. *Barry*, 44 F. Supp. 829 (D. Minn., 1942); *Wilkinson* v. *Noland*, 40 F. Supp. 1009 (E. D. Va., 1941); *Travis* v. *Ray*, 41 F. Supp. 6 (E. D. Ky., 1941); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn., 1943); *Campbell* v. *Mandel Auto Parts*, 31 N. Y. Supp. (2d) 656 (N. Y. Sup. Ct., 1942), aff'd, 264 A. D. 701 (N. Y. Sup. Ct. App. Div.); *Schneider* v. *Sports Vogue*, 35 N. Y. Supp. (2d) 431 (N. Y. Sup. Ct. 1942); *Rubin* v. *Meadow Provisions Co.*, 39 N. Y. Supp. (2d) 517-518 (N. Y. City Ct.).

9) and, furthermore, it is conceded that the payment of the back overtime was voluntarily made, before controversy, and without even a demand (R. 23, 24, 25; Petition for Writ, p. 4).

There being no divergence in the decisions of the circuits upon this point, nor in the highest appellate tribunals of the various states where the question has been reviewed, certiorari should be denied.*

III.

All constitutional questions invoked by petitioner have already been passed upon by this Court.

Petitioner has urged, as a ground for the granting of certiorari, that the imposition of the mandatory liability for liquidated damages upon violation, where there was difficulty in determining applicability of the Act, is violative of the due process clause of the Fifth Amendment to the Federal Constitution. This precise point has already been passed upon here, and rejected by this Court. See *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572. See also *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100 (1941); *Kirschbaum* v. *Walling*, 316 U. S. 517 (1942).

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* The New York State Court of Appeals, in rejecting as invalid a purported release or waiver of benefits under a somewhat similar remedial, public policy enactment, observed in *Wood* v. *Horgan*, 291 N. Y. 426: "We may not give judicial sanction to means designed to evade the legislative will. * * * Believing as we do, that the enactment * * * was prompted by considerations of public policy, it is not within the function of the judicial process to weaken the protective measure which the legislators chose to adopt."

IV.

This court has already refused to grant a writ in a similar case despite similar arguments.

In the case of *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), the Tenth Circuit Court of Appeals held, as at bar, that voluntary restitution of the back overtime did not discharge or release an employer from the mandatory liability for liquidated damages. This Court refused an application for a writ of certiorari in 320 U. S. 772 (Oct. 18, 1943). The grounds urged as a basis for the granting of a writ were identical, in every respect, to the grounds here urged. (See application of petitioner and brief of *amicus curiae* for writ of certiorari in No. 222, October Term, 1943.)

CONCLUSION

No adequate reason is set forth in the petition for the granting of a writ of certiorari and application therefor should be denied.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

No. 445

Supreme Court of the United States

OCTOBER TERM, 1944

BROOKLYN SAVINGS BANK,

Petitioner,

v.

WILLIAM J. O'NEIL,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT

MAX R. SIMON,
Attorney for Respondent.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statement	2
The Question Presented	4
Statute Involved	6
ARGUMENT	
Considerations of Paramount Public Policy Dictate that Release is not a Good Defense to an Action by an Employee to Recover Liquidated Damages Under the Fair Labor Standards Act	7
A. The liability for liquidated damages under Section 16(b) is a mandatory liability regardless of the nature of the violation	7
B. The public policy underlying legislation prescribing, in the public interest, minimum wage and hour standards for the benefit of wage-earners forbids a release, waiver of any part of the sums required to be paid by the employer	8
C. The decision in Guess v. Montague, 140 F. (2d) 500 (C. C. A. 4, 1943), involving an accord and satisfaction, is both inapposite and legally unsound	19
D. Answering petitioner's brief	24
Conclusion	27
Appendix	28

CASES CITED

Asaro v. Lilienfeld, 36 N. Y. Supp. (2d) 802 (City Ct., N. Y. C., N. Y. Co., 1942)	18
Atlantic Co. v. Broughton, ——— F. (2d) ———, 7 Wage Hour Rept. 1176, 8 Labor Cases (C. C. H.), par. 62, 435 (C. C. A. 5, Dec. 4, 1944)	15, 24

PAGE

Barrineau v. Carolina Milling Co., 52 F. Supp. 197, 199 (D. S. C. 1942) 21
Birbalas v. Cuneo Printing Industries, 140 F. (2d) 826 (C. C. A. 7, 1944) 12, 14, 21, 24
Bosse v. Cross & Brown Inc., N. Y. Law Journal, June 4, 1943, 6 Wage Hour Rept. 614 (City Ct., N. Y. C., N. Y. Co., 1943) 18
Bumpus v. Continental Baking Co., 124 F. (2d) 549, 551-552 (C. C. A. 6, 1941) 11

Campbell v. Mandel Auto Parts, 31 N. Y. Supp. (2d) 656 (Sup. Ct. N. Y., N. Y. Co., 1942) aff'd 264 App. Div. 701 18
Carleton Screw Products v. Fleming, 126 F. (2d) 537, 541 (C. C. A. 8, 1942) 12
Cato v. Grendel Cotton Mills, 132 S. C. 454, 129 S. E. 203 10
City of Glendale v. Coquat, 46 Ariz. 478, 52 P. (2d) 1178 10
Clark v. State, 142 N. Y. 101 10
Colan v. Wecksler, 45 F. Supp. 508 (S. D. N. Y., 1942) 17
Cornell v. Taylor, 137 A. D. 496 6
Crowe v. Liquid Carbolic Co., 208 N. Y. 396 25
Cudahy Packing Co. of Ala. v. Bazanos, 15 So. (2d) 720 (Sup. Ct. Ala., 1943) 12
Culver v. Bell & Loffland, 7 Wage Hour Rept. 1190, 8 Labor Cases (C. C. H.), par. 62, 443 (C. C. A. 9, 1944) 24

David v. Atlantic Co., 26 S. E. (2d) 650 (Ga. Ct. App., 1943) 19

Emerson v. Mary Lincoln Candies, 173 Misc. 531, 174 Misc. 353, aff'd 261 A. D. 879, aff'd 287 N. Y. 577 ..... 17, 24
Engel v. Justrite Handkerchief Co., 180 Misc. 974, 43 N. Y. Supp. (2d) 688 (Sup. Ct., N. Y., N. Y. Co., 1943) 18

Fiedler v. Potter, 172 S. W. (2d) 1007 (Sup. Ct. Tenn., 1943) 12
Fleming v. Post, ——— F. (2d) ———, 7 Wage Hour Reporter 1206, 8 Labor Cases (C. C. H.), par. 62,450 (C. C. A. 2, Dec. 14, 1944) 6, 11, 13, 15, 21

PAGE

Fleming v. Warshawsky, 123 F. (2d) 622 (C. C. A. 7, 1941) 11, 12

Gangi v. D. A. Schulte, 53 F. Supp. 844 (S. D. N. Y., 1943) 14
George Lawley & Son Corp. v. South, 140 F. (2d) 439, 442 (C. C. A. 1, 1944), cert. den. ——— U. S. ———, May 22, 1944 24
Goebel v. Elliott, 178 Wash. 444, 35 P. (2d) 44 19
Greenbaum v. Meadow Provisions Co., N. Y. Law Journal, Nov. 13, 1942, 5 Wage Hour Rept. 919 (Sup. Ct., N. Y., N. Y. Co., 1942) 18
Guess v. Montague, 140 F. (2d) 500 (C. C. A. 4, 1943) 19, 20, 21, 22

Hall v. Smith, 5 Wage Hour Rept. 637, 6 Labor Cases (C. C. H.), par. 61, 180 (E. D. Ky., 1942) 12
Hutchinson v. Barry, 44 F. Supp. 829 (D. Mass., 1942) 12

Jervarian v. Brown, Wheelock etc., N. Y. Law Journal, Oct. 20, 1943, 6 Wage Hour Rept. 1209 (City Ct., N. Y. C., N. Y. Co., 1943) 18
Johnson v. Dierks Lumber Co., 130 F. (2d) 115, 118 (C. C. A. 8, 1942) 12

Katz v. Film Metal Box Corp., 181 Misc. 812, 47 N. Y. Supp. (2d) 454 (City Ct., N. Y. C., Bnx. Co., 1944) 18
Kehn v. State of New York, 93 N. Y. 291 10
Kirsehbaum v. Walling, 316 U. S. 517 ..... 2, 3, 13

Larsen v. Rice, 100 Wash. 642, 171 Pac. 1037 10
Loggins v. Steel Construction Co., 129 F. (2d) 118, 120 (C. C. A. 5, 1942) 21

Midstate Horticultural Co. v. Penn. R. R. Co., 320 U. S. 356, 88 L. Ed. 83 (1943) 26
Montague's Adm'r v. Massey, 76 Va. 307 10
Morehead v. New York, 298 U. S. 587, 635 (1936) 9, 23

Nelson v. Chicago Mill & Lumber Corp., 76 F. (2d) 17, 23 (C. C. A. 8, 1935) 6
Northwestern Yeast Co. v. Broutin, 133 F. (2d) 628, 630-641 (C. C. A. 6, 1942) 21

Overnight Motor Transport Co. v. Missel, 316 U. S. 572 ..... 2, 3, 7, 11, 17, 25

PAGE

Pitt v. Board of Ed., 216 N. Y. 304 10
Plourde v. Mass. Realty Co., 47 F. Supp. 686 (D. Mass., 1942) 26

Ralston v. Reynolds, 134 Misc. 462, aff'd 227 A. D. 768, aff'd 253 N. Y. 605 6
Rigopoulos v. Kervan, 47 F. Supp. 576 (S. D. N. Y. 1943), aff'd 140 F. (2d) 506 (C. C. A. 2, 1943) ..12, 15, 17, 21, 24
Rubin v. Meadow Provisions Co., 39 N. Y. Supp. (2d) 517 and 518 [two opinions] (City Ct., N. Y. C., N. Y. Co., 1942) 18

Schneider v. Sports Vogue, Inc., 35 N. Y. Supp. (2d) 431 (Sup. Ct., N. Y., Kings Co., 1942) 18
Schuttinger v. Woodruff, 259 N. Y. 212, 216 6
Seneca Coal & Coke Co. v. Lofton, 136 F. (2d) 359, 363 (C. C. A. 10, 1943), cert. den. 320 U. S. 772 (1943) 15, 21, 24
Southern Package Corp. v. Walton, 18 So. (2d) 458 (Miss. Sup. Ct., 1944), cert. den. ——— U. S. ———, Oct. 23, 1944 24
Spiedel Co. v. Barstow Co., 232 Fed. 617 21
Strand v. Garden Valley Telephone Co., 51 F. Supp. 898 (D. Minn., 1943) 12, 17

Tennessee Coal, Iron & R. R. Co. v. Muscoda Local, 321 U. S. 590 (1944) 11, 25
Tidewater Optical Co. v. Wittkamp, 19 S. E. (2d) 897, 901 (Sup. Ct. Va., 1942) 17
Travis v. Ray, 41 F. Supp. 6 (E. D. Ky., 1941) 12

Union Prod. Co. v. Pardue, 117 F. (2d) 225, 227 (C. C. A. 5, 1941) 6
United States v. Darby, 312 U. S. 100, 122-123 (1941) 11
U. S. v. Johnson, 52 F. Supp. 382 (W. D. N. Y., 1943) 12
U. S. v. Morley Constr. Co., 98 F. (2d) 781 (C. C. A. 2), cert. den. sub nom Maryland Casualty Co. v. U. S., 305 U. S. 651 ..... 10, 25

Van Choate v. General Electric Co., 245 Fed. 140 21

Walling v. Helmerich & Payne ——— U. S. ———, Nov. 6, 1944 25
West Coast Hotel Co. v. Parish, 300 U. S. 379, 392 ... 9

PAGE

Wilkinson v. Noland, 40 F. Supp. 1009 (E. D. Va., 1941) 12, 26
Withers v. Herbert McLean Purdy Management Corp., 181 Misc. 724, 47 N. Y. Supp. (2d) 260 (Sup. Ct., N. Y., N. Y. Co., 1944) 18
Wood v. Horgan, 291 N. Y. 422, 426 25
Wright v. State, 223 N. Y. 44 10

STATUTES

Judicial Code
Section 237(b), as amended by the Act of February 13, 1925 2

Fair Labor Standards Act of 1938
(52 Stat. 1060, 29 U. S. C. Secs. 201 et seq.) 6, 20, 28
Section 6 ..... 7, 20, 22
Section 7 ..... 2, 7, 20
Section 7(a) 28
Section 16(b) 2, 3, 4, 7, 8, 20, 21, 25, 26

Interstate Commerce Act
Section 16 26

New York State Labor Law
Section 196 24

MISCELLANEOUS

Senate Report No. 844, 75th Cong., 1st Sess. 1937 25

Report of Committee on Wage Collection (1936), Bulletin No. 629, United States Department of Labor, Bureau of Labor Statistics, page 139 23

Commons and Andrews, Principles of Labor Legislation (1936), page 330 23

83 Cong. Rec. 9255 (1938) (conference agreement) 13, 21, 22

57 Harvard Law Review 257, 258 (1943) 14, 22

43 Columbia Law Review 355, 359 (1943) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK,

Petitioner,

v.

WILLIAM J. O'NEIL,

Respondent.

BRIEF FOR THE RESPONDENT

Opinions Below

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed the complaint without opinion after trial without a jury. The unanimous opinion of the Supreme Court of the State of New York, Appellate Term, reversing and directing judgment in favor of plaintiff, is reported in 180 Misc. 542 (R. 59). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, further affirming, appears in 267 App. Div. 317 (R. 65-73). The Court of Appeals of the State of New York handed down its unanimous affirmance on June 14, 1944. The per curiam affirmance, which indicates the questions involved and passed upon, appears in 293 N. Y. 666.

Jurisdiction

The Court of Appeals of the State of New York—which is the highest Court of the State in which a decision in the suit could be had—issued its remittitur on June 14, 1944 (R. 75). The final judgment of the Municipal Court of the City of New York, after filing of the remittitur, was entered on August 17, 1944 (R. 77). The petition for writ of certiorari was filed on September 8, 1944, and was granted, limited to the second question in the petition, on November 6, 1944 (R. 83). Petitioner has invoked jurisdiction of this Court under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement

Respondent was employed by petitioner as a night watchman at a commercial building located in the City of New York, from October 24, 1938, the date when the Fair Labor Standards Act went into effect, to August 30, 1940 (R. 6, 13). He brought this action under Section 16(b) of the Act to recover the sum of $423.16 as liquidated damages resulting from the petitioner's retention for several years of an equal amount which respondent concededly earned as overtime under Section 7 of the Act during the period of his employment.

On June 1, 1942, this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, held subject to the overtime provisions of the Fair Labor Standards Act night watchmen, such as respondent, employed in guarding against fire and theft commercial buildings housing, as here, tenants producing goods for interstate commerce. On June 8, 1942, this Court in *Overnight Motor Transport Co.* v. *Missel*, 316 U. S. 572, held that, in view of the mandatory character of the statutory language, an employer who has violated the overtime provisions of the Act becomes automatically

liable for "an additional equal amount as liquidated damages" under Section 16(b), regardless of good faith or alleged inability to determine that the Act applied. Thereafter in November of 1942 (R. 6), long after plaintiff's employment had terminated, and long after the overtime compensation in question had been earned: petitioner paid respondent the sum of $423.16 concededly earned as overtime under the Act during the period he was employed.* Before getting his back overtime, respondent was required to sign "certain papers" (R. 49) constituting a "form release" (R. 49) by which petitioner sought to relieve itself "from any and all claims, debts, damages or liabilities arising out of or in connection with his claim of any kind or character, whatsoever growing out of his overtime employment" (R. 6). Respondent was never advised that petitioner was then equally liable to him under the statute for an additional amount as liquidated damages, although petitioner claims to have "explained" that the paper respondent "was to sign * * * was to cover overtime and costs or anything arising out of his employment" (R. 47). No demand for payment was ever made of the bank (R. 17), nor did petitioner, at the time of payment, dispute respondent's right to this back overtime or deny that respondent's employment was subject to the Act's coverage (R. 16).

On February 16, 1943, this suit was instituted to recover the unpaid liquidated damages. Respondent's right to recover has heretofore been affirmatively upheld on three different appeals; upon each appeal every issue of law and fact involved has been resolved against petitioner and in favor of respondent.

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* Petitioner did not pay this back overtime as the result of a settlement of a "disputed application through equity proceedings" by the Wages and Hour Administrator (Pet. Br., pp. 17 and 18). Not until after the *Kirschbaum* and *Overnight* decisions by this Court, whereby petitioner's liability was conclusively established in double the amount of the wage underpayment, did it make any payment at all,—and then it paid only one-half.

The Question Presented

The questions certified by the New York Court of Appeals in its remittitur as having been duly presented and involved there were (R. 106):

1. That an action may not be maintained under Section 16(b) of the Act by an employee solely for the recovery of liquidated damages when it is admitted that all overtime compensation was voluntarily paid in full by the employer prior to the institution of suit.

2. That the release of all further claims and damages under the Fair Labor Standards Act executed by the employee and delivered to his employer at the time he received payment of all overtime compensation due him under the Act is a good defense to an action subsequently brought by such employee solely to recover liquidated damages.

3. That the imposition of liquidated damages deprives an employer of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

Petitioner sought certiorari on each of these questions (Pet. for Writ. p. 2), but this Court, in granting the petition for a writ, limited its review to the second question only (R. 83).*

Under the circumstances, petitioner seeks to evade the limits of the review in urging that the question here presented is "whether an employee has a right to statutory liquidated damages for non-payment of overtime under the Fair Labor Standards Act where, prior to

* Petitioner paraphrased this question as follows: "Whether upon such payment (i. e. back overtime) a release of any such additional liability does not bar recovery of such damages (Pet. for Writ, p. 2, question 2).

either claim or suit therefor, the employer has voluntarily paid the full amount of such overtime and the employee has given a release of any such additional liability" (Pet. Br., p. 2). Petitioner, in stating the issue, has obviously lumped together both the first and second questions and is here renewing its attempt to obtain a review of issues which this Court has refused to accept (compare Pet. Br., pp. 7, 11, 12 and 13; Pet. for Writ, pp. 5, 6, 10, 11, 16, 17, 18 and 19).

Nor is it here necessary for respondent to again demonstrate that his employment was subject to the Act's coverage. This issue was resolved in respondent's favor on the three different appeals previously had and the petitioner has not preserved this issue for further review (compare Pet. Br., pp. 4 and 5; Pet. for Writ, p. 5). Similarly, respondent refrains from joining issue on arguments impugning the constitutionality of Section 16(b) of the Act because this Court has declined review upon this ground also (R. 106, question 3; R. 83; compare Pet. for Writ, p. 2 and Pet. Br., pp. 16 and 17).

Finally, in its specification of errors (Pet. Br., p. 6) petitioner urges that the New York State Court of Appeals failed "to give effect to the well established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation * * * in permitting respondent to repudiate the settlement." In its brief, also, petitioner would have it appear that this appeal involves a question of accord and satisfaction.* But this ignores

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* See for example references to "settlement of controversies" (Pet. Br., p. 17); "a purported attempt to "freely reach a settlement" (Pet. Br., p. 16) or to "adjust their own controversies" (Pet. Br., p. 13); "mutually voluntary adjustment" (Pet. Br., pp. 8, 15).

The record abundantly supports the failure of the New York Court of Appeals to certify any question of accord and satisfaction (R. 106). In the first place, in introducing the release into evidence, defense counsel stated: "This is the release which we plead by way of a

(Continued on following page)

the precise language of the remittitur of the New York State Court of Appeals which clearly indicates that there is here involved merely the question of legal sufficiency of a release. And this Court has limited its review accordingly.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201 *et seq.*) are set forth in the appendix.

(*Continued from previous page*)

complete defense to the action" (R. 43). Subsequently, petitioner's motion to dismiss at the close of the entire case was phrased as follows: "Your Honor, I respectfully renew my motion for a dismissal of the complaint * * * for the reason that the plaintiff released any claim for liquidated damages" (R. 51). Finally, there was neither pleaded nor proved here a settlement of "a genuine controversy * * * involving an actual and substantial difference of opinion [as when] one asserts the validity of his claim, and the other * * * in good faith * * * denies all or part of it." *Schuttinger* v. *Woodruff*, 259 N. Y. 212, 216. See also *Union Prod. Co.* v. *Parduc*, 117 F. (2d) 225, 227 (C. C. A. 5, 1941); *Nelson* v. *Chicago Mill & Lumber Corp.*, 76 F. (2d) 17, 23 (C. C. A. 8, 1935).

As the Second Circuit recently held in *Fleming* v. *Post*, F. (2d) , 7 Wage Hour Reporter 1206, 8 Labor Cases (C. C. H.) par. 62,450 (C. C. A. 2, Dec. 14, 1944): "A condition precedent to a valid accord and satisfaction is the establishment of a bona fide dispute * * *." The record would seem to reveal no actual and substantial difference of opinion as to liability asserted and denied by the opposing party. Petitioner here ignores its obligation to specifically plead the affirmative defense of accord in its answer (New York Civil Practice Act, Section 242) and to assume the burden of its proof (*Cornell* v. *Taylor*, 137 A. D. 496; *Ralston* v. *Reynolds* 134 Misc. 462, aff'd 227 A. D. 768, aff'd 253 N. Y. 605), and now attempts to torture its only defense of release (R. 6, pars. 6 and 7 of answer) into a plea of compromise and settlement or accord and satisfaction.

ARGUMENT

Considerations of Paramount Public Policy Dictate that Release is not a Good Defense to an Action by an Employee to Recover Liquidated Damages Under the Fair Labor Standards Act.

A.

The liability for liquidated damages under Section 16(b) is a mandatory liability regardless of the nature of the violation.

Section 16(b) of the Act, insofar as here applicable, provides that "any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

The mandatory character of the liability for liquidated damages under Section 16(b), regardless of the nature of the violation, has been clear since *Overnight Motor Transp. Co., Inc.* v. *Missel*, 316 U. S. 572 (1942), affg. 126 F. (2d) 98 (C. C. A. 4, 1942). The Circuit Court of Appeals had there said:

> Is this provision of the law as to liquidated damages mandatory or discretionary? Since the Act has been violated in good faith in this case, we would indeed like to hold that it is discretionary. It seems a keen injustice for employers bewildered by strange legislalation and confused by divergent authority in the Courts to be subjected to such a measure. Yet no matter how much we lament its harshness, the section appears to be mandatory and virtually all of the Courts have so construed it. The use of the word "willful" in Section 16(a) defining criminal liability under the Act and its omission in Section 16(b) defining civil liability would seem to indicate that the employer's good faith is immaterial under Section 16(b). [126 F. (2d) 110-111.]

In affirming, this Court observed:

> In the Circuit Court of Appeals it was held that the liquidated damages provision, Section 16(b) of the Act, was mandatory on the Courts, regardless of the good faith of the employer or the reasonableness of his attitude. Petitioner attacks this conclusion as a denial of due process because if the damage provision is mandatory, the employer is 'without opportunity to test the issues before the Courts' * * *. Petitioner points out that if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act * * *.
>
> Perplexing as petitioner's problem may have been the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute, and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under Section 6(a) and 7(a) are compensation, not a penalty or punishment by the Government * * *. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages. [316 U. S. 581, 583.]

Thus, respondent's recovery here automatically follows, unless a release of claims under Section 16(b), upon partial payment of the full fixed liability imposed by the mandatory provisions of the section, was a good defense to the action.

B.

The public policy underlying legislation prescribing, in the public interest, minimum wage and hour standards for the benefit of wage-earners forbids a release, or waiver of any part of the sums required to be paid by the employer.

It long has been established that legislation prescribing minimum wage or hour standards for the benefit of the working man is profoundly affected with the public inter-

est,—being intended not only only for the benefit of the individual wage-earner but to protect and safeguard the community at large as well. As the Chief Justice observed in his dissenting opinion in *Morehead* v. *New York*, 298 U. S. 587, 635 (1936):

> We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone, that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on the government itself, the burden of solving the problems of poverty, subsistence, health, and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve, today they are the burden of the nation.

Thus, the doctrine of freedom of contract is subject to constitutional limitations when confronted with legislation in the public interest founded upon recognition of the wage-earner's inability to bargain with his employer on an equal footing. In the words of Mr. Chief Justice Hughes in *West Coast Hotel Co.* v. *Parish*, 300 U. S. 379, 392:

> This power * * * to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable."

Therefore, employers may not, under the guise of freedom of contract, relieve themselves of the obligations imposed upon them in the public int[illegible] through any agreement with their employees, whether entered into in advance of employment or after the work has been performed. Thus agreements of release, waiver, compromise and settlement or accord and satisfaction have uniformly been held unavailing as defenses to actions by employees to recover any part of sums required to be paid them under paramount provisions of a law enacted for the

public welfare. *U. S.* v. *Morley Constr. Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den. sub nom. *Maryland Casualty Co.*, v. *U. S.*, 305 U. S. 651; *Larsen* v. *Rice*, 100 Wash. 642, 171 Pac. 1037; *City of Glendale* v. *Coquat*, 46 Ariz. 478, 52 P. (2d) 1178; *Goebel* v. *Elliot*, 178 Wash. 444, 35 P. (2d) 44; *Cato* v. *Grendel Cotton Mills*, 132 S. C. 454, 129 S. E. 203; *Montague's Adm'r* v. *Massey*, 76 Va. 307; *Kehn* v. *State of New York*, 93 N. Y. 291; *Wright* v. *State*, 223 N. Y. 44; *Clark* v. *State*, 142 N. Y. 101; *Pitt* v. *Board of Ed.*, 216 N. Y. 304.

The doctrine has been well expressed in *Larsen* v. *Rice:*

> It is undoubtedly a general rule that private controversies between individuals sui juris may be compromised by them by mutual agreement, and that the courts will not, where no question of fraud intervenes, relieve from the agreement, even though it be shown that the one gained rights thereby to which he would not otherwise have been entitled, and that the other gave up rights to which he was fully entitled; this on the principle that compromises are favored by the law, since they tend to prevent strife and conduce to peace and to the general welfare of the community. But the controversy here had an added element not found in the ordinary controversy between individuals. It was not a wholly private concern. It was affected with a public interest. * * * The statute was not therefore intended solely for the benefit of the individual wage-earner. It was believed that the welfare of the public requires that wage-earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage-earner, it must follow that any contract or settlement of a controversy arising out of a failure to pay the fixed minimum wage * * * is voidable, if not void * * *. Our opinion is that it is such a contract as the courts are not required to enforce, and that it would be against the policy of the statute so to do. [171 Pac. 1037, 1039-1040].

The nature of the Fair Labor Standards Act as remedial in character, designed to protect employees against sub-

standard labor conditions, and thus pregnant with the public interest, is apparent from the findings and declaration of policy which Congress recited in Section 2 of the Act. As this Court noted in *United States* v. *Darby*, 312 U. S. 100, 122-123 (1941), in sustaining the Act's constitutionality, that "the objectives of the Act expressed in Section 2 are highly remedial in character * * * the intention of Congress * * * should be examined in the light of the benefits sought to be bestowed upon millions of employees." See also *Overnight Transport Motor Co.* v. *Missel*, 316 U. S. 572, 576-577 (1942); *Bumpus* v. *Continental Baking Co.*, 124 F. (2d) 549, 551-552 (C. C. A. 6, 1941). Only recently this Court had occasion to reaffirm this principle in *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590 (1944):

> These provisions * * * of the Fair Labor Standards Act are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profits of others. These are the rights that Congress has specially legislated to protect.

The same doctrine, therefore has been regularly applied in cases involving the Fair Labor Standards Act and the Courts have repeatedly repudiated as inconsistent with the public interest agreements which would permit the employer to escape the obligations imposed upon him under the Act by payment of anything less than that which the statute requires to be paid. Thus agreements to release, waive or compromise any portion of the liability created by the mandatory provisions of the Act have been held invalid, whether entered into before or after the employee's work has been performed. *Fleming* v. *Post*, F. (2) , 8 Labor Cases (C. C. H.) par. 62,450, 7 Wage Hour Rept. 1206 (C. C. A. 2, Dec. 14, 1944); *Fleming* v. *Warshawsky*, 123 F. (2d) 622 (C. C. A. 7, 1941);

Johnson v. *Dierks Lumber Co.*, 130 F. (2d) 115, 118 (C. C. A. 8, 1942); *Carleton Screw Products* v. *Fleming*, 126 F. (2d) 537, 541 (C. C. A. 8, 1942); *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Rigopoulos* v. *Kervan*, 47 F. Supp. 576 (S. D. N. Y., 1943), aff'd 140 F. (2d) 506 (C. C. A. 2, 1943); *Fiedler* v. *Potter*, 172 S. W. (2d) 1007 (Sup. Ct. Tenn., 1943); *Cudahy Packing Co. of Ala.* v. *Bazanos*, 15 So. (2d) 720 (Sup. Ct. Ala., 1943); *Hutchinson* v. *Barry*, 44 F. Supp. 829 (D. Mass., 1942); *Wilkinson* v. *Noland*, 40 F. Supp. 1009 (E. D. Va. 1941); *Travis* v. *Ray*, 41 F. Supp. 6 (E. D. Ky., 1941); *Hall* v. *Smith*, 5 Wage Hour Rept. 637, 6 Labor Cases (C. C. H.) par. 61,180 (E. D. Ky., 1942); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn., 1943); *U. S.* v. *Johnson*, 52 F. Supp. 382 (W. D. N. Y., 1943).

This principle is aptly reflected in *Fleming* v. *Warshawsky* where releases were held invalid:

> The court found that they were obtained voluntarily and without coercion. In our view of the matter, the manner in which they were obtained is immaterial. * * * Defendants concede that an agreement, in advance of employment, to accept less than permitted by law would render nugatory the objectives of the Act. We think precisely the same result would follow if the employer, by agreement with its employees, be permitted to pay less than the Act prescribes. Waivers in advance of employment are no different in substance or effect than waivers of back pay for past employment. * * * In each situation, the statutory requirements and the purposes of the legislation are ignored [123 F. (2d) 622, 626].

As expressed by District (now Circuit) Judge Ford in *Hutchinson* v. *Barry*:

> The Act constitutes a declaration of public policy against substandard labor conditions. This policy would be defeated if the validity of contracts such as this were to be upheld. It is obvious that desire to

> continue in employment on the part of the laborer would make it easy for an employer who wished to ignore the Act's provisions to induce him to execute a release of claims under the provisions of the Act. Unless such agreements as this be declared void, it would therefore be easy to circumvent the declared purpose of Congress [44 F. Supp. 829].

The most recent judicial expression in point is the holding of the Second Circuit Court of Appeals in *Fleming* v. *Post*, where, under facts identical in every respect with those here, the Circuit Court affirmed judgment for employees in the amount of their unpaid liquidated damages. The court found that during the employment period in question "plaintiffs were not paid the overtime compensation required by Section 7 of the Act. After the decision of the Supreme Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, the employees were paid" their back overtime "after each had signed a release * * * presented to him for signature. Thereafter they brought suit to recover the liquidated damages. The defendants contested on the ground that there had been an accord and satisfaction between the plaintiffs and the defendants after a bona fide dispute as to their right to collect the money; that the release barred the recovery of the statutory liquidated damages; that the employees were not covered by the Act". The Circuit Court held:

> We think there can be no valid release of the right to the payment of the back minimum and overtime wages. *O'Neil* v. *Brooklyn Savings Bank*, 293 N. Y. 666; *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622, 626 (C. C. A. 7); we do not agree with *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4). And Congress and the courts have considered the claim for back wages and to liquidated damages as a single right. See 83 Cong. Rec. 9255 (1938) (conference agreement); *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2). It would seem clear, therefore, that the same principle should govern the ability to release a claim for liquidated damages. *Strand* v. *Garden*

> *Valley Tel. Co.*, 51 F. Supp. 898, 904 (D. Minn.); cf. *United States* v. *Morley Construction Co.*, 98 F. (2d) 781 (C. C. A. 2). In any case, Congress probably did not intend any right created by the Fair Labor Standards Act for the employees benefit to be negotiable in a market where bargaining power is unequal 57 Harv. L. Rev. 257, 258 (1943) [F. (2d) , , 8 Labor Cases (C. C. H.) par. 62,450].*

Similarly affirming the right of employees to recover liquidated damages although they had executed releases upon receiving their back overtime, prior to suit, the Seventh Circuit Court of Appeals, in *Birbalas* v. *Cuneo Printing Industries, Inc.* held:

> The language of the statute and its interpretation by various courts tend toward promulgation of the doctrine that in cases such as this, the liability created by Congress for non-payment of overtime wages and for liquidated damages and attorney's fees may not be compromised; that it is a single and entire cause of action which cannot be discharged or satisfied by paying merely part of it. * * *
>
> If it were possible, we would prefer to sustain the validity of the releases, but no matter how much we may lament the law's harshness, the section appears to be mandatory. Relief from severity must come from the Congress and not from the Court. * * *
>
> Payment of compensation alone to persons endowed with additional rights was not sufficient to satisfy the entire liability. [140 F. (2d) 826, 828-829].

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* By virtue of this decision, the case of *Gangi* v. *D. A. Schulte*, 53 F. Supp. 844 (S. D. N. Y., 1943), upon which petitioner has placed great reliance, has now been reversed. Even in this case the District Court did not hold that a mere waiver or naked release would be a valid defense to an action for the damages, but, instead, asserted that an "accord and satisfaction" resulting from an "adjustment * * * (or) settlement * * * of disputes by arm's length negotiations" would be a valid bar to the damages and would not offend the legislative mandate. However, as noted, this case no longer represents the law in the Second Circuit even as to a *bona fide* accord and satisfaction.

Similar is the recent holding of the Fifth Circuit in *Atlantic Co. v. Broughton,* F. (2d) , 7 Wage Hour Rept. 1176, 8 Labor Cases (C. C. H.) par. 62,435 (C. C. A. 5, Dec. 4, 1944), where the employees had executed written releases upon receiving voluntary payment of back overtime:

> Under this Section if an employer on any regular payment date fails to pay the full amount of the minimum wages and overtime compensation due an employee, there immediately arises an obligation upon the employer to pay the employee the difference between the wages paid and the wages due, plus an equal additional amount as liquidated damages; and the payment thereafter of the balance due as wages, even though made prior to suit, does not release the accrued liability for liquidated damages. Such damages are not inflicted as a penalty, but are allowed as compensation for detention of a workman's pay.*

Again, in *Rigopoulos* v. *Kervan:*

> The plain and simple issue presented here * * * is whether or not the employer having paid plaintiffs the overtime pay due them may be relieved from the payment of the equal amounts as liquidated damages * * *.

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* Notwithstanding, the Fifth Circuit concluded that the liability for liquidated damages could be extinguished through a genuine "accord and satisfaction" based on a "bona fide settlement" of a "disputed question of fact" resulting from an "actual controversy relating to the number of hours worked". But, the court particularly noted that unless payment of the back overtime was made "under such circumstances as would create an agreement of accord and satisfaction", the claims for liquidated damages would "continue to be valid * * * enforceable obligations", despite the releases executed by the employees. [Note full statement of facts in 54 F. Supp. 185 (N. D. Ga., 1944).] Compare, however, the Second Circuit's holding to the contrary in *Fleming* v. *Post,* above cited: "We should reach the same result if there were here an accord and satisfaction." In any event the instant appeal involves no question of accord and satisfaction but only the legal sufficiency of defense of release.

See also footnote above, pages 5-6.

> At the time the employer paid these amounts he was already indebted to each employee in double such amount. Acceptance by the employee of this wage restitution * * * does not bar recovery of the additional amount as liquidated damages. If a worker is employed in excess of the specified hours without receiving the prescribed payment he is entitled to twice the amount of the underpayment. This provision of law giving the right to liquidated damages is mandatory and not discretionary. An employee may not bargain this right away. There must be full payment under the statute.
>
> The employee may not give a valid release of his rights against the employer in consideration of receiving payment of an amount less than that provided by statute.
>
> The question of good faith does not enter into the situation. * * * The language of the statute is clear and mandatory. [47 F. Supp. 576-577].

In affirming, the Second Circuit Court of Appeals said:

> The overtime compensation was paid long after it was due. Section 7 of the Act, 29 U. S. C. A. Sec. 207, plainly contemplates that overtime compensation shall be paid in the regular course of employment and not accumulated beyond a regular pay day. Hence the failure to pay it, when due, was a violation of Sec. 7, which rendered the employer "liable", as declared in Section 16(b), not only for the unpaid overtime compensation, but also, for liquidated damages in an additional equal amount. This is a single and entire liability. It is not discharged in toto by paying one-half of it. The liquidated damages provision has been held to be mandatory on the Courts regardless of the good faith of the employer or the reasonableness of his belief that no overtime compensation was

owed. *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 582-3. [140 F. (2d) 506].*

See also *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943) cert. den. 320 U. S. 772 (1943).

In similar vein is the rationale of *Strand* v. *Garden Valley Telephone Co.*:

> Defendant also resists the action on the ground that the plaintiffs have released and discharged the defendant from liability on the claims for which recovery is sought. An employee under the Fair Labor Standards Act of 1938 may not bargain away such rights as are given by the Act. The right to damages for failure on the part of the employer to pay an employee the minimum wage is mandatory and does not become a matter of discretion for the courts, nor a matter of agreement between the parties. To hold otherwise would be an abortion of the intent of Congress, defeat in part the purposes for which the act was passed, and open the way to injustice, if not to fraud * * *. The plaintiff * * * did not have the right under the law to compromise or settle for lesser benefits than the law provides. Such receipt and release or agreement as were executed * * * did not bar recovery in this action. [51 F. Supp. 898, 904].

Particularly apposite is the decision in *United States* v. *Morley Constr. Co.*, 98 F. (2d) 781 (C. C. A. 2, 1938),

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* Nor could the result be different if the back overtime had been paid as a result of the settlement of an injunction suit instituted by the Wage and Hour Administrator to enjoin violation of the Act. As noted by the Second Circuit here, "none of the plaintiffs was a party to the Administrator's suit. The fact that some of them here paid in pursuance of a compromise of such suit we regard as completely irrelevant in the present action." Furthermore, the Administrator cannot compromise the rights of either the employee or the employer under the Act. *Colan* v. *Wecksler*, 45 F. Supp. 508 (S. D. N. Y. 1942); *Tidewater Optical Co.* v. *Wittkamp*, 19 S. E. (2d) 897, 901 (Sup. Ct. Va., 1942; *Rigopoulos* v. *Kervan*, 47 F. Supp. 576 (S. D. N. Y. 1942); *Strand* v. *Garden Valley Telephone Co.*, 57 F. Supp. 898 (D. Minn. 1943); *Emerson* v. *Mary Lincoln Candies*, 173 Misc. 531, aff'd 2[illegible] A. D. 879, aff'd 287 N. Y. 577.

cert. den. sub. nom. *Maryland Casualty Co.* v. *U. S.*, 305 U. S. 651 (1938):

> Their releases were void. The statute was passed to protect them against the economic pressure it was assumed they would be unable to resist, if offered a job. To this end it was as necessary to deny them the power to bargain away their privilege after they had performed their labor as before * * *. The statute, which forbade any contract that did not protect them, forbade any release—another contract—which deprived them of the protection so granted * * *. We are satisfied that the statute cannot be circumvented by so easy a device [98 F. (2d) 781, 788-789].

It follows, therefore, that the release executed by respondent was void and legally unavailing, as a defense, to bar a recovery here.*

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* To like effect are the numerous lower court decisions in the State of New York holding defenses of waiver, release and accord and satisfaction to be legally insufficient. See *Campbell* v. *Mandel Auto Parts*, 31 N. Y. Supp. (2d) 656 (Sup. Ct., N. Y., N. Y. Co., 1942), aff'd 264 App. Div. 701; *Engel* v. *Justrite Handkerchief Co.*, 180 Misc. 974, 43 N. Y. Supp. (2d) 688 (Sup. Ct., N. Y., N. Y. Co., 1943); *Schneider* v. *Sports Vogue, Inc.*, 35 N. Y. Supp. (2d) 431 (Sup. Ct., N. Y., Kings Co., 1942); *Withers* v. *Herbert McLean Purdy Management Corp.*, 181 Misc. 724, 47 N. Y. Supp. (2d) 260 (Sup. Ct., N. Y., N. Y. Co., 1944); *Asaro* v. *Lilienfeld*, 36 N. Y. Supp. (2d) 802 (City Ct., N. Y. C., N. Y. Co., 1942); *Rubin* v. *Meadow Provisions Co.*, 39 N. Y. Supp. (2d) 517 and 518 [two opinions] (City Ct., N. Y. C., N. Y. Co., 1942); *Greenbaum* v. *Meadow Provisions Co.*, N. Y. Law Journal, Nov. 13, 1942, 5 Wage Hour Rept. 919 (Sup. Ct., N. Y., N. Y. Co., 1942); *Bosse* v. *Cross & Brown Inc.*, N. Y. Law Journal, June 4, 1943, 6 Wage Hour Rept. 614 (City Ct., N. Y. C., N. Y. Co., 1943); *Jervanian* v. *Brown, Wheelock etc.*, N. Y. Law Journal, Oct. 20, 1943, 6 Wage Hour Rept. 1209 (City Ct., N. Y. C., N. Y. Co., 1943); *Katz* v. *Film Metal Box Corp.*, 181 Misc. 812, 47 N. Y. Supp. (2d) 454 (City Ct., N. Y. C., Bnx. Co., 1944)

C.

The decision in *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943), involving an accord and satisfaction, is both inapposite and legally unsound.

Confronted with the great weight of authority which has unanimously rejected the defense of release in an action of this character as contrary to the legislative mandate, petitioner seeks judicial support for its position in *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943). In that case it appeared that "defendant was doubtful as to whether the Act applied to his business"; accordingly, "he called in the plaintiffs, explained the situation to them", and plaintiffs agreed to accept the amount tendered, constituting the back overtime, "as full settlement" and "in full discharge and satisfaction", and executed releases. The Fourth Circuit, although conceding that nothing less than payment in full could ever discharge the obligation for the back overtime, held that under such circumstances as would create "a contract of accord and satisfaction", there might be a valid acquittance of the mandatory liability for liquidated damages. Petitioner has recognized that this case "gives effect to accord and satisfaction" based upon a "settlement" of "a dispute as to coverage of the Act" (Pet. for Writ, pp. 8-9). Clearly, the Fourth Circuit did not hold that the release executed by the employee was a good defense, but only that the mandatory liability for the liquidated damages could be extinguished through a genuine accord and satisfaction.*

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* The distinction was clearly recognized in *David* v. *Atlantic Co.*, 26 S. E. (2d) 650 (Ga. Ct. App., 1943), which follows the minority view. After noting some of the many cases which have unanimously rejected defenses of release, the court stated: "The controlling difference between these cases and the instant one is that here the agreed statement of fact shows that a bona fide dispute

(*Continued on following page*)

The conclusion reached in the *Guess* case is, in any event, based upon an erroneous interpretation of the Fair Labor Standards Act. The decision rests upon a mistaken assumption that the liability imposed by Section 16(b) for violation of Sections 6 or 7 consists of two separate and distinct claims or causes of action, "one for the balance of the minimum wages and overtime compensation fixed by law, the other for liquidated damages in a like amount". Upon this erroneous premise the Fourth Circuit bases its conclusion that the assumed separate and distinct liability for liquidated damages is not affected with the public interest and thus may properly be the subject of a genuine or *bona fide* "contract of accord and satisfaction". The unsoundness of both the premise and the conclusion may be readily demonstrated.

In the first place, the plain language of Section 16(b) indicates that, immediately upon an employer's failure to pay overtime as required by Section 7, there springs into being a single, entire and indivisible liability to the employee in twice the amount of the underpayment.* And Congress, in providing the remedy for violation, has referred to it as "*action* to recover such *liability*."

Typical of the clear weight of authority contrary to the reasoning in the *Guess* case is the holding in *Rigo-*

(*Continued from previous page*)

existed between the parties as to whether the employer's work constituted interstate commerce within the meaning of the statute, and as to the actual number of overtime hours worked by the employee, while it did not appear in any of the above cited cases that such a bona fide dispute between the parties existed." The court then concluded that, in the absence of "a settlement of a bona fide dispute between the employer and his employee", the cases holding releases to be invalid "are sound".

See also discussion above at page 15.

* "Any employer who violates * * * shall be liable to the employee or employees affected in the amount of * * * their unpaid overtime compensation * * * and in an additional equal amount as liquidated damages". 29 U. S. C. § 216(b).

poulos v. *Kervan*, 140 F. (2d) 506, 507 (C. C. A. 2, 1943) that a violation of Section 16(b) creates a "single and entire liability * * * not discharged in toto by paying one-half of it". To the same effect is *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826, 829 (C. C. A. 7, 1944) where the Court observed that "rather than conclude that the cause of action consists of two claims, as indicated in *Guess* v. *Montague*, we prefer the thought expressed by the Second Circuit in *Rigopoulos* v. *Kervan*, that this is a single and entire liability * * *. The cause of action is one and indivisible." The most recent judicial expression in point is *Fleming* v. *Post*, F. (2d) , 7 Wage Hour Reporter 1206, 8 Labor *Cases* (C. C. H.) par. 62,450 (C. C. A. 2, Dec. 14, 1944) where the Second Circuit stated: "We do not agree with *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4). And Congress and the Courts have considered the claim for back wages and to liquidated damages as a single right. See 83 Cong. Rec. 9255 (1938) (conference agreement)". See also *Loggins* v. *Steel Construction Co.*, 129 F. (2d) 118, 120 (C. C. A. 5, 1942); *Northwestern Yeast Co.* v. *Broutin*, 133 F. (2d) 628, 630-641 (C. C. A. 6, 1942); *Barrineau* v. *Carolina Milling Co.*, 52 F. Supp. 197, 199 (D. S. C. 1942); and compare *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359, 363 (C. C. A. 10, 1943), cert. den. 320 U. S. 772 (1943).*

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* The conclusion reached by the Fourth Circuit becomes the more untenable when viewed in the light of the assertion that because the "triple damages under the Patent Statutes" can be "settled by agreement," therefore, by analogy, the liquidated damages under the Wage and Hour Act, should, equally be the subject of a valid accord and satisfaction. But the character and purposes of the two statutes are radically different. The damages under the Act, upon violation, are liquidated in amount, mandatory in character and constitute a compensatory assessment which the Courts have no discretion to relax. On the other hand, the damages flowing from an infringement of the Patent Statutes are highly speculative and, having always been held penal from the very nature of things (*Spiedel Co.* v. *Barstow Co.*, 232 Fed. 617; *Van Choate* v. *General Electric Co.*, 245 Fed. 140), are, therefore, not highly regarded by the courts.

The decision in *Guess* v. *Montague* was the subject of sharp criticism in 57 Harv. L. Rev. 257, 258 (1943):

> The purpose of this statute is to assure the employee certain rights and conditions which he is unable to secure for himself because of the superior bargaining power of the employer. • • • The Supreme Court has held that the right to liquidated damages is compensatory for the uncertain damages caused the employee by the retention of his legal wages and that good faith on the part of the employer does not affect this right. • • • And previous decisions have indicated that the employee could not surrender it. • • • The Courts have generally declared a contract of accord and satisfaction for less than the minimum wage illegal as opposed to the policy of the Act. • • • *And it would seem that Congress contemplated no difference between the employee's right to recover unpaid wages and his right to an equal amount in liquidated damages; both were lumped together and considered as a single recovery.* See 83 Cong. Rec. 9255 (1938) (conference agreement). The instant court differentiated between these two rights on the ground that the payment of the minimum wage is expressly required by Sec. 6 of the statute. But since that section does not give the employee any rights, it should not affect the interpretation of Sec. 16(b) which treated the two rights given the employee as of equal importance. It would seem illogical, therefore, to consider the right to the wage deficiency inviolate, but the right to liquidated damages releasable (Italics supplied).

See also 43 Columbia Law Review 355, 359 (1943).

Following the rationale of the decision in the *Guess* case, *supra*, petitioner has suggested that liquidated damages are to be distinguished from "the base liability" (Pet. Br., p. 7), and that they "are not public but personal rights" (Pet. for Writ, p. 11). This contention overlooks the nature and function of the provision for liquidated damages in the particular statute involved here. What petitioner designates as "the base

liability" under the Act is not fundamentally different from the liability for liquidated damages so far as the public interest is concerned. To those familiar with the problems of wage earners, for whose protection the Fair Labor Standards Act was enacted, it is axiomatic that the maintenance of a decent subsistence standard of living is as much dependent upon *timely payment of wages* as upon the amount of the wages. A reasonable or even a high wage rate may decrease in value and become substandard because of delays and uncertainties in the time of payment or because of the infrequency of the pay periods. Delay in the payment of wages, no less than low wage rates, results in "a wage insufficient to support the worker," and may affect profoundly "the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community." [*Morehead v. New York*, 298 U. S. 587, 635.]*

It has been repeatedly emphasized in the literature on the subject of wages and wage collection that "for the great number of wage earners who are completely dependent each week upon their wages it is important to receive their pay without delay" and that "even a short delay causes hardship" and "brings want and privation." See *Report of Committee on Wage Collection* (1936), Bulletin No. 629, United States Department of Labor, Bureau of Labor Statistics, page 139. To give an employee the same amount of wages after the lapse of time is in effect to pay him at a reduced rate.

> Whatever the nominal amount [of wages] may be, the frequency of the time of payment is a matter of concern to the laborer. The longer he must wait for his wages the greater is the extent of his need for credit, and accordingly the higher will be his cost of living and the lower his real wages. [Commons and Andrews, *Principles of Labor Legislation* (1936), p. 330.]

* The soundness of this principle is particularly emphasized by the exigencies of the present case where respondent, employed at the marginal wage of $23 for a 72 hour workweek (R. 14-15), was deprived of his overtime wages for a period of four years.

It has been uniformly held that the rigid requirements of the Act, designed to effecuate the paramount public policy with which it is profoundly affected, can be satisfied only by prompt payment of the overtime wages as currently earned in the regular course of employment.* *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), cert. den. 320 U. S. 772 (1943); *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2, 1943); *George Lawley & Son Corp.* v. *South*, 140 F. (2d) 439, 442 (C. C. A. 1, 1944), cert. den. ——— U. S. ———, May 22, 1944; *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Culver* v. *Bell & Loffland*, 7 Wage Hour Rept. 1190, 8 Labor Cases (C. C. H.) par. 62,443 (C. C. A. 9, 1944); *Atlantic Co.* v. *Broughton*, 7 Wage Hour Rept. 1176, 8 Labor Cases (C. C. H.) par. 62,435 (C. C. A. 5, Dec. 4, 1944); *Emerson* v. *Mary Lincoln Candies*, 173 Misc. 531, 174 Misc. 353, aff'd 261 A. D. 879, aff'd 287 N. Y. 577; *Southern Package Corp.* v. *Walton*, 18 So. (2d) 458 (Miss. Sup. Ct., 1944), cert. den. ——— U. S. ———, Oct. 23, 1944.

Indeed, the statutory aims are completely frustrated when, as here, the employee is deprived of his wages for a period of four years and the employer is able thereby to derive unfair advantage over a competitor who scrupulously adheres to the Act's requirements.

D.

Answering petitioner's brief.

Petitioner has sought to rely on the fact that the statute, as originally drawn, contained a provision that

> Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive

* The public policy to enforce prompt payment is also manifest in Section 196 of the New York State Labor Law, which requires that "every person carrying on business * * * shall pay weekly to each employee the wages earned."

compliance with any provision of this Act or with any regulation or order thereunder shall be null and void [Senate report No. 844, 75th Cong., 1st Sess., 1937].

It has been argued that the elimination of this provision from the final bill by the Conference Committee indicates congressional intent to permit private settlements (Pet. Br., pp. 10-11).

It is clear, however, that this provision was omitted from the bill merely because Congress considered it unnecessary. Any doubt in this regard is dispelled by the fact that the provision relied on was stricken out together with another subsection of the same section of the bill which made "void any contract made in violation of any provisions of the Act". Such contracts have been held void by this Court *in the absence of any provision in the statute*. *Overnight Motor Corp.* v. *Missel*, 316 U. S. 572; *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590; *Walling* v. *Helmerich & Payne*, U. S. , Nov. 6, 1944. See also *United States* v. *Morley Const. Co.*, 98 (2d) 781, 788 (C. C. A. 2), cert. den. 305 U. S. 651. It is clear therefore that, in striking these provisions from the proposed bill, Congress was merely eliminating the obvious.*

Of further significance is the fact that at the time the non-waiver provision was removed from the proposed bill, the latter contained no provision for employee suits similar to the present Section 16(b). The mandatory liability created by this section, as subsequently added, in favor of the employee, obviously removed any need for a non-waiver clause.

---

* It is fundamental that a waiver or release of protective rights which is inconsistent with the public policy which the legislative act manifests is no less invalid because the enactment involved contains no express prohibition against a waiver of the statute's benefits. *Wood* v. *Horgan*, 291 N. Y. 422, 426; *Crowe* v. *Liquid Carbolic Co.*, 208 N. Y. 396.

Section 16(b), with its peremptory language, was the method or expedient deemed necessary by the legislators to insure compliance with the Act. "An action under Section 16(b) * * * is one in which the public has a decided interest. It is one method by which the congressional conception of public policy is enforced * * *. The liability of an employer under the Act is something more than a debt or a liability to an individual. An employee exercising his rights under Section 16(b) of the Act exercises them * * * for the benefit of the general public". *Plourde* v. *Mass. Realty Co.*, 47 F. Supp. 668 (D. Mass. 1942). "The objectives of the Act and the methods employed to obtain them may not be set at naught by agreements between the parties * * *. To approve a waiver by employees * * * would be to thwart the purposes of the Act". *Wilkinson* v. *Noland*, 40 F. Supp. 1009 (D. C. Va. 1941).

Finally, the many authorities cited by petitioner sustaining settlements of controversies or compromises of disputed claims under legislation of a different character are not here in point (compare Pet. Br., pp. 13-14). As has been observed, there is here involved no question of accord and satisfaction. Moreover, this Court in *Midstate Horticultural Co.* v. *Penn. R. R. Co.*, 320 U. S. 356, 88 L. Ed. 83 (1943) recently took cognizance of the inherent inhibition against waivers of rights created by statutes affecting the public welfare. In construing the Interstate Commerce Act, also a "public policy" enactment, the Court rejected a similar contention, "* * * Not unmindful of the hardship * * * in the special circumstances * * * (or) the strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest, might move against denying effect to such an agreement," the Court, nevertheless, held:

> Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regu-

> lation it imposes. The Act is affected, throughout its provisions, with the object not merely of regulating the relations of carrier and shipper inter se, but of securing the general public interest * * *. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, *rigid adherence to the statutory scheme and standards is required.* This obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce.*

The parallel is readily apparent.

Conclusion

In view of considerations of paramount public policy, the release which respondent was required to sign when paid only his back overtime was void and ineffective to bar his recovery of liquidated damages. It is respectfully submitted, therefore, that the judgment below should be affirmed.

Respectfully submitted,

MAX R. SIMON,
Attorney for Respondent.

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* Here, too, the statute did not expressly forbid a waiver.

Appendix

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. Secs. 201 et seq.) read as follows:

* * * * *

Sec. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce.

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

Sec. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

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No. 445

Supreme Court of the United States

OCTOBER TERM, 1944

BROOKLYN SAVINGS BANK, Petitioner,

v.

WILLIAM J. O'NEIL, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

MAX R. SIMON,
Attorney for Respondent.

INDEX

Cases Cited

	PAGE
P. Bronsten & Co. v. Hoffman, 199 A. 121 (N. J. Ct. of App. 1937)	3
Butler v. Carter, 8 Wage Hour Rept. 92, 9 Labor Cases par. 62,507 (Jan. 6, 1945)	6
Cato v. Grendel Cotton Mills, 129 S. E. 203, 132 S. C. 454 (S. C. Sup. Ct.)	2
Coaker v. Soper, 53 F. (2d) 190, 191, 192	7
Fredler v. Potter, 6 Wage Hour Rept. 85 (Tenn. Ct. of App., 1942)	6
Fleming v. Miller, 47 S. Supp. 1004, rev. on other grounds, 138 F. (2d) 629, cert. den. 321 U. S. 784	4
Groves v. Adelman, 4 Wage Hour Rept. 274, 4 Labor Cases 60,415 (Mun. Ct., District of Columbia, 1941)	3
Gould v. Champeny & Turk, 249 A. D. 911, 292 N. Y. S. 530 (1937)	3
Pilatos v. Hyde, 119 Pac. (2d) 323 (Wash. Supt. Ct., 1941)	2
Russell v. Rudd, 1923 A. C. 309, 12 B. R. C. 171	5
Sugrue v. Champion, 128 Conn. 574, 24A. (2d) 890, 893	6
Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590, ———	4
Virginia Electric Co. v. N. L. R. B., 319 U. S. 533	7
Walling v. Helmerich & Payne, ——— U. S. ———, Nov. 6, 1944	8

Statutes

Fair Labor Standards Act. Section 16(b)	4, 6, 7
Emergency Price Control Act of 1942, Sec. 205 (e), 56 Stat. 23 (1942), 50 U. S. C., Appendix Supp. 111, Sec. 901, 925 (a)	7

Supreme Court of the United States

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK,

Petitioner,

v.

WILLIAM J. O'NEIL,

Respondent.

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

This memorandum concerns itself solely with the presentation of several authorities dealing with the question of waiver or release under social and remedial legislation analogous to the Fair Labor Standards Act.

The liability imposed upon an employer under analogous social legislation such as Minimum Wage Statutes and Workmen's Compensation Acts cannot be waived or released by the employee.

The duties or liabilities imposed upon the employer, under remedial social legislation such as the Fair Labor Standards Act, State Minimum Wage Statutes and Workmen's Compensation Acts are all duties charged with the public interest because, in the legislative judgment, their performance or discharge would effectuate the policies of the legislation. Consequently, the law will not sanction a purported discharge of the employer's liability by means of a waiver or release procured from the employee—*despite*

*the absence of a non-waiver or non-settlement provision in the legislation.**

On all fours is the decision in *Cato* v. *Grendel Cotton Mills*, 129 S. E. 203, 132 S. C. 454 (S. C. Sup. Ct.) involving an agreement by an employee to waive benefits of legislation imposing, as here, further liability upon an employer for a delay in payment of wages as therein prescribed. The trial court held that the employer could not discharge his liability under this type of legislation by means of a waiver agreement with the employee, because *the parties "could not, by contract, add to the statute something the Legislators did not see fit to write into it"* (129 S. E. 204). In affirming the Supreme Court stated:

> May the corporation (employer) lawfully contract so to limit the performance of the absolute duty mandatorily imposed by the statute * * *.
>
> It (the legislation) is a public measure, enacted in the interest of the public welfare. *If so, the duty imposed upon * * * employers by this statute is one charged with a public interest, which is independent of the interests of the individual parties to the contract of employment, and cannot be made the subject of contractual barter and sale between the * * * employer and the laborer.*
>
> *The duty imposed by this statute upon * * * employers is a public duty in the discharge of which the public has an interest which is independent of the interests of the individual parties to the particular contract of employment in question*, and that against the performance of such public duty, the contractual stipulation here relied on (waiver), under the fundamental prin-

---

* It long has been held that the benefits conferred upon employees under remedial, wage legislation are irrevocable benefits forced upon him by the public policy and they cannot be waived by the employee or anyone else. 11 G. Wash. L. Rev. 391, April 1943, No. 3. Cf. *Pilatos* v. *Hyde*, 119 Pac. (2d) 323 (Wash. Supt. Ct., 1941): "The natural right of the employer and the employee to contract between themselves must yield to what the legislature has established as the law."

> cipal that private citizens may not by contract abrogate the interest of the public in the discharge of duties imposed by statute, was utterly ineffectual * * * (129 S. E. 206-207) (Emphasis supplied). (Matter in parenthesis supplied.)

The same result obtained under the District of Columbia minimum wage law. In the case of *Groves* v. *Adelman*, 4 Wage Hour Rept. 274, 4 Labor Cases 60,415 (Mun. Ct., District of Columbia, 1941) it was held:

> The minimum wage law was not enacted merely to establish private rights. It was a solemn declaration by Congress, as a matter of public policy, that a special cloak of protection should be thrown around women * * *. That protection cannot be waived by individual employees, for it has now become the protection of the community as well. This plaintiff is but a single member of the community, and was without power to contract away her rights.

Similar are the holdings under various Workmen's Compensation Laws. In New York the principle is unchallenged that "the employer is not at liberty to enter into an arrangement with the employee whereby the employer is released from its obligation under the Workmen's Compensation Law." *Gould* v. *Champeny & Turk*, 249 A. D. 911, 292 N. Y. S. 530 (1937).

The decision in *P. Bronsten & Co.* v. *Hoffman*, 199 A. 121 (N. J. Ct. of App. 1937) is particularly cogent because of an attempt there, too, to urge that a private settlement of rights created under the New Jersey Workmen's Compensation Act would be valid, if approved by an Administrative Bureau charged with the enforcement of the Act. In rejecting such a contention and holding that nothing less than payment in full of the amounts therein prescribed could suffice, the court held:

> Insofar as it (the settlement) purports to effect an irrevocable surrender of a right to compensation granted by statute, the agreement, notwithstanding the

agreement of the Bureau, runs counter to the policy of the law and is voidable, if not void.

And, where the agreement was intended by the parties to be a final disposition of the claim for compensation, and full payment has been made in accordance with its terms, the sum so paid, if less than that prescribed by the statute, is considered merely a part payment * * *. We find no provision in the statute vesting in the Bureau authority to approve a compromise of a valid claim under its provisions for less than the sum thereby prescribed * * *. The policy of the law is not served by reduced payments to one entitled to its benefits.

This contract (settlement) is of concern to the State. The legislative policy is obviously grounded in social and economic considerations. The common interest vindicates the incidental restraint upon the liberty of contract.

The Compensation Bureau is a creature of the statute. Its jurisdiction is special and limited; and it is invested only with such authority as is expressly conferred, or such as is by fair implication and intendment incident to and included in the authority expressly granted for the enforcement of the statute. Any reasonable doubt of the existence of a particular power in the Bureau is to be resolved against the exercise of such authority.* (Matter in parentheses supplied.)

---

* The exclusive remedy under Section 16(b) is the only means by which Congress intended the employer's civil liability under the Act to be enforced. *Fleming* v. *Miller*, 47 S. Supp. 1004, rev. on other grounds, 138 F. (2d) 629, cert. den. 321 U. S. 784. The authority of the Wage and Hour Administrator, aside from criminal sanctions, has been expressly limited to an application in equity "to restrain violations" of Sections 6 and 7 (Sec. 17 and 11a). Obviously, therefore, no administrative agency, nor anyone else, has the power to fritter away "rights that Congress specially legislated to protect." *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, ——. Further, the record does not support any claim of settlement between petitioner and the Wage Hour Division; but if we go outside of the record, as suggested by petitioner, it will be observed that the so-called "settlement", in which respondent never

(*Continued on following page*)

To like effect is the decision in *Russell* v. *Rudd,* 1923 A. C. 309, 12 B. R. C. 171, wherein the House of Lords held that no private settlement between employer and employee, no matter how fair and reasonable, and despite open disclosure of all the facts, could deprive the employee of the full benefits prescribed by the English Compensation Act. It was there observed that there could be no discharge of the employer's duties under the Act save in strict obedience to the legislative will. Only Lord Carson dissented, and this lone dissent is, coincidentally, based upon grounds similar to those urged at bar as cause for reversal. Lord Carson stated, in dissenting:

> The broad question is whether * * * it is competent for the workman and the employer to settle or compromise a claim. If the answer is in the negative (as it was) one of the results will be that it will not be possible in any case, however doubtful or raising any of the difficult questions which so often arise as to whether, for example, the workman is entitled to compensation under the Act, for the employer and the workman to agree to a settlement of the disputed points by payment of a lump sum, and the parties, however willing they may be to agree, or however beneficial the agreement may be, will be left to litigate such disputed questions. My view is that the power to compromise their disputes being inherent in all persons of full contractual capacity, that power is not in any particular case to be regarded as taken

participated and of which he was completely ignorant, consisted of nothing more than a verification by the Wage Hour Division of the accuracy of petitioner's own computation of the back overtime due respondent. This computation was, obviously, based upon records regularly kept by it during the entire period of respondent's employment indicating the number of hours worked by him each week and the salary received (R. 16). Petitioner, without approval or authorization from the Wage Hour Division, prepared its own form release and had respondent sign it when it made payment of the back overtime concededly earned by him. At the time of the payment, petitioner did not disclose to respondent that he had any additional rights under the Act or, that in accordance with its arrangements with the Wage Hour Division all that respondent was supposed to sign was a receipt for the back wages. (Pet. Reply Brief, pp. 15-16, Note 3.)

away by any other than very plain statutory words (1923 A. C. 331, 335). (Matter in parentheses supplied.)

Even where compensation acts specifically provide for private settlements of disputed claims, it is recognized that such settlements are not conclusive as any "purported release" of the employer from payment of the full amount due under the statute "is restricted within limits unknown to the common law:" *Sugrue* v. *Champion,* 128 Conn. 574, 24 A. (2d) 890, 893.

Only recently the Georgia Supreme Court, in considering Section 16(b) of the Fair Labor Standards Act, unanimously held in the case of *Butler* v. *Carter,* 8 Wage Hour Rept. 92, 9 Labor Cases par. 62,507 (Jan. 6, 1945):

> As has been well recognized, the rights provided to the employee are not his alone, but are affected with a public interest, and they may not be waived or renounced whether before or after they become due (*Broughton* v. *Atlantic Co.*, 54 F. Supp. 185, remanded by the Fifth Circuit Court of Appeals to the District Court in order that certain disputed issues of fact could be determined) * * *.
>
> Because of the very nature of the objectives of this legislation, they become public problems in which every taxpayer has a vital interest. Therefore, it becomes very clear that the requirements of the Fair Labor Standards Act cannot be avoided by any agreement * * * that may be entered into by the employer and the employee.

Similar is the determination in *Fiedler* v. *Potter,* 6 Wage Hour Rept. 85 (Tenn. Ct. of App., 1942) where the court held:

> These releases could not and did not relieve the defendants of their liability under the Act in question. To hold otherwise would nullify its provisions * * *. The Act is mandatory in its provisions and no settlement made between the employer and employee outside of its provisions is binding.

This determination was affirmed in 172 S. W. (2d) 1007 (Tenn. Sup. Ct., 1943) with the observation that these "releases were ineffective, in view of the mandatory provisions of the Federal Act to relieve against violation of its terms."

Obviously, Section 16(b) was designed, not merely to provide the means of enforcing the employer's civil liability under the Act, but to serve the more important function of relieving the Government of part of the burden of enforcement (cf. 83 Cong. Rec. 9264—Conference Committee). Acting as a strong deterrent to violation, this section constitutes the protective measure designed by Congress to promote compliance with the terms and provisions of the Act, and thereby provide the most practical and, indeed, the most effective means of effectuating the public policy with which the legislation is profoundly affected. As observed by the Senate Conference Committee, in considering an identical provision in the Emergency Price Control Act of 1942, Sec. 205 (e), 56 Stat. 23 (1942), 50 U. S. C., Appendix Supp. III, Sec. 901, 925(a), such statutory provisions "have proved valuable in the enforcement of * * * regulatory statutes, such as the Fair Labor Standards Act, both to relieve the Government of a part of the burden of enforcement and to deter initial violation" Senate Report No. 931, 77th Cong. 2d Sess. p. 9 (1942). See, also, 12 G. Wash. L. Rev. p. 472 (1943): "The purpose of the provision is to aid in the enforcement of the Act" (cf. *Virginia Electric Co.* v. *N. L. R. B.*, 319 U. S. 533). Therefore, to sustain a release or waiver would create a result which, even if induced by proper motives, would undermine the effective enforcement of the Act. *U. S.* v. *Reading Co.*, 253 U. S. 26; *Coaker* v. *Soper*, 53 F. (2d) 190, 191, 192.

Thus, as recently stated by the New York Court of Appeals in rejecting a waiver under analogous social legislation based upon inequality between the parties:

> We may not give judicial sanction to means designed to evade the legislative will. * * *. Believing as we do,

> that the enactment * * * was prompted by considerations of public policy, it is not within the function of the judicial process to weaken the protective measure which the legislators chose to adopt. *Wood* v. *Horgan*, 291 N. Y. 426.

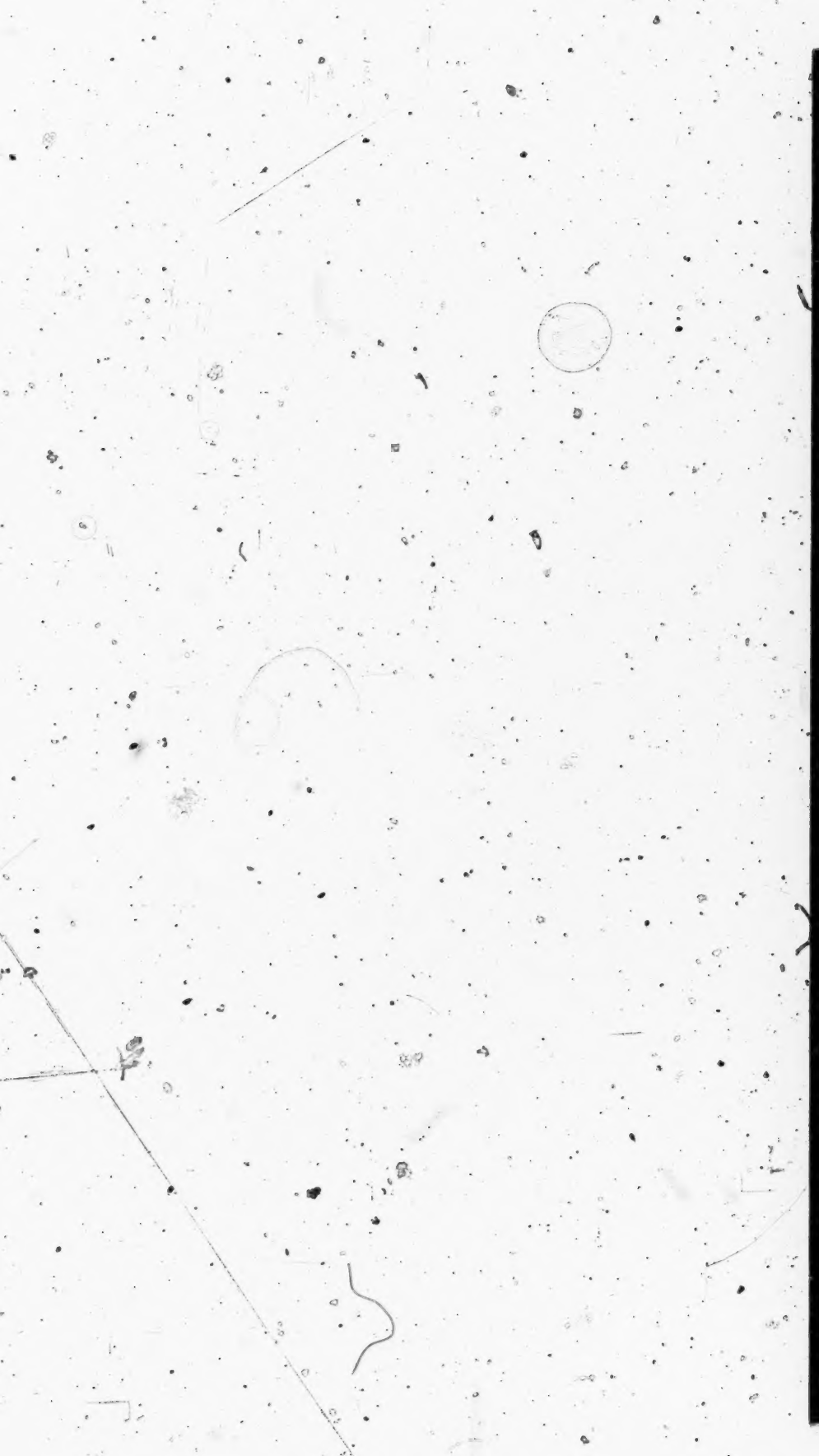
It is, therefore, respectfully submitted that the release obtained from respondent is invalid and cannot discharge petitioner's mandatory liability to pay liquidated damages. "No plan so obviously inconsistent with the statutory purpose can lay a claim to legality", for it "would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act." *Walling* v. *Helmerich & Payne*, U. S. , Nov. 6, 1944.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

MAX R. SIMON,
Attorney for Respondent.



INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	3
Statute involved	3
Statement	3
Argument:	
I. The question of the validity of the alleged releases is a Federal question governed by federal law	8
II. The effect of a release upon liability under the Fair Labor Standards Act	9
Appendix	25

CITATIONS

Cases:	
Atlantic Co. v. *Broughton*, 7 Wage Hour Rept. 1168	11, 12, 13
Birbalas v. *Cuneo Printing Industries*, 140 F. (2d) 826	11, 12, 13, 23
Board of Commissioners v. *United States*, 308 U. S. 343	8, 9
Campbell v. *Mandel Auto Parts Corp.*, 5 Wage Hour Rept. 56	11
Cassese v. *Manufacturers Trust Co.*, 46 N. Y. S. (2d) 621	11
Chicago, Milwaukee & St. Paul Ry. Co. v. *Clark*, 178 U. S. 353	12
Clarke v. *126 Fifth Avenue Corp.*, 7 Wage Hour Rept. 427	11
David v. *Atlantic Co.*, 26 S. E. (2d) 650	11
Davies Warehouse Co. v. *Bowles*, 321 U. S. 144	9
Deitrick v. *Greaney*, 309 U. S. 190	8
D'Oench, Duhme & Co. v. *Federal Deposit Ins. Corp.*, 315 U. S. 447	8
Engel v. *Justrite Handkerchief Co.*, 6 Wage Hour Rept. 614	11
Fiedler v. *Potter*, 172 S. W. (2d) 1007	11
Fire Insurance Assoc., Ltd. v. *Wickham*, 141 U. S. 564	12
Fleming v. *Warshawsky & Co.*, 123 F. (2d) 622	11
Garrett v. *Moore-McCormack Co.*, 317 U. S. 239	8
Greenbaum v. *Meadow Provision Co.*, 5 Wage Hour Rept. 919	11
Guess v. *Montague*, 140 F. (2d) 500	7, 10, 12
Hutchinson v. *Barry*, 50 F. Supp. 292	11

Cases—Continued. Page

Jerome v. *United States*, 318 U. S. 101 ..... 8, 9
Kirschbaum Co. v. *Walling*, 316 U. S. 517 ..... 4, 21
Lawley & Son Corp., George, v. *South*, 140 F. (2d) 439, certiorari denied, 322 U. S. 746 13
McKenzie v. *Irving Trust Co.*, No. 188, this Term, decided January 8, 1945 9
Midstate Horticultural Co. v. *Penna. R. R. Co.*, 320 U. S. 356 ..... 9, 10
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111 ..... 8, 9
Ortiz v. *Compania Cervecera de Puerto Rico*, 6 Wage Hour Rept. 345 11
Overnight Motor Co. v. *Missel*, 316 U. S. 572 15
Post v. *Fleming*, 7 Wage Hour Rept. 1206 ..... 11, 12, 15, 22
Prudence Corp. v. *Geist*, 316 U. S. 89 8
Rigopoulos v. *Kervan*, 140 F. (2d) 506 ..... 11, 12, 13
Rodriguez v. *Corporation Azucarera Sauri y Subria*, 5 Wage Hour Rept. 956 11
Royal Indemnity Co. v. *United States*, 313 U. S. 289 8
Schattinger v. *Woodruff*, 259 N. Y. 212 22
Seneca Coal & Coke Co. v. *Lofton*, 136 F. (2d) 359, certiorari denied, 320 U. S. 772 ..... 10, 12, 13
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173 ..... 8, 9
Strand v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 11
Tennessee Coal, Iron & R. R. Co. v. *Muscoda Local*, 321 U. S. 590 11
Thorpe v. *Nash-Finch Co.*, 5 Wage Hour Rept. 878 11
Union Producing Co. v. *Pardue*, 117 F. (2d) 225 22
Walling v. *Miller*, 138 F. (2d) 629, certiorari denied, 321 U. S. 784 17
Walton v. *Southern Package Corp.*, 320 U. S. 540 4

Statute:

Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., secs. 201 et seq.:
Sec. 2 25
Sec. 6 (a) 10, 25
Sec. 7 (a) 10, 26
Sec. 16 (b) 12, 15, 26
Sec. 17 14

Miscellaneous:

83 Cong. Rec. 9255, 9264 14
Labor Laws and Their Administration, 1936, Bulletin No. 629, United States Department of Labor, Bureau of Labor Statistics, p. 139 (Report of Committee on Wage Collection Laws) 15
S. 2475, as passed by Senate, 75th Cong., 1st. Sess. 14

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK, PETITIONER

v.

WILLIAM J. O'NEIL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

No. 554

L. ELWOOD DIZE, TRADING AS DIZE BOX COMPANY, PETITIONER

v.

LAKE MADDRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

OPINIONS BELOW

No. 445

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed

the complaint without opinion (R. 69). The opinion of the Appellate Term of the New York Supreme Court (R. 79–80), reversing the Municipal Court, is reported at 180 Misc. 542. The opinion of the Appellate Division, First Department (R. 90–102), affirming the Appellate Term (except for counsel's fee which was modified), is reported at 267 App. Div. 317. The Court of Appeals of the State of New York affirmed the Appellate Division without opinion.

No. 554

The opinion of the District Court for the District of Maryland (R. 59–61), rendering a judgment in favor of the plaintiff, is not officially reported but is printed in 7 Wage Hour Rept. 313. The opinion of the Court of Appeals for the Fourth Circuit (R. 64–66), affirming the District Court, is reported at 144 F. (2d) 584.

JURISDICTION

No. 445

The Court of Appeals of the State of New York issued its remittitur on June 14, 1944 (R. 105). The petition for writ of certiorari was filed September 8, 1944 and granted, limited to question (2), on November 6, 1944. The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

No. 554

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on August 1, 1944 (R. 66). The petition for certiorari was filed on October 6, 1944 and granted, limited to question 2 (d), on November 13, 1944. The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the validity of the alleged releases is governed by federal or by state law.

(2) Whether any part of the liability for unpaid wages and liquidated damages provided by Section 16 (b) can be validly released by private agreement.

STATUTE INVOLVED

The sections of the Fair Labor Standards Act primarily involved are Sections 2, 6 (a) (1–4), 7 (a), and 16 (b). These sections appear in the Appendix, *infra,* pages 25–27.

STATEMENT

No. 445

William J. O'Neil, respondent in No. 445, was employed by petitioner as a night watchman in its eleven-story business building located at 443 Fourth Avenue, New York City, from November 5, 1938 to August 30, 1940 (R. 19). Though a substantial portion of that building was devoted

to the production of goods for commerce (R. 25–50),[1] petitioner failed to pay O'Neil the overtime compensation he had earned under Section 7 of the Act.[2] On November 13, 1942, however, over two years after O'Neil had left petitioner's service, petitioner computed the statutory overtime compensation due O'Neil and offered him a check for $432.16 in return for a release of all his rights under the Act (R. 54–55). O'Neil signed the re-

[1] Petitioner does not challenge the decisions below on the question of coverage under the Act; it suggests, however, that the coverage was doubtful because no manufacturing was permitted in the building (br. of petitioner *Brooklyn Savings Bank*, pp. 3–4, and note 2) and because "none of * * * the tenants were engaged in any actual and substantial production for interstate commerce" (id. p. 5, note 3). In the light of this Court's decisions (see *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walton* v. *Southern Package Corp.*, 320 U. S. 540), the record in this case admits no doubt that the employee was covered by the Act. Despite the covenants against manufacturing contained in the leases (R. 56–57), at least two of the tenants, occupying approximately 1½ floors, manufactured gloves and glove specimens in the building and regularly shipped them outside the state (R. 32–33, 45–47). In any event, manufacturing is not the sole basis on which respondents' coverage can be sustained, e. g., three of the eleven floors in the building as well as the basement were occupied by a furnitutre company which received 80 or 90%, and shipped about half, of its goods outside of the state (R. 25–31). The latter company, in addition to being engaged in the shipment of goods in interstate commerce, was also engaged in their production for commerce inasmuch as it was engaged in the finishing and assembling of the furniture which it sold (R. 28, 29).

[2] Cf. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walton* v. *Southern Package Corp.*, 320 U. S. 540.

lease[*] and took the check (R. 23). Subsequently, he filed this suit to recover the liquidated damages due him under Section 16 (b) of the Act (R. 4–7).

The Municipal Court dismissed the complaint without opinion (R. 66–67, 69) but the Appellate Term reversed per curiam (R. 74–75, 79–80). The Appellate Division affirmed per curiam (R. 90–91) on the ground that there was "no escape from the statutory language," and the Court of Appeals affirmed without opinion (R. 105). The Municipal Court, upon the Court of Appeals' remittitur, entered final judgment for respondent (R. 108–110).

No. 554

This also is a suit under Section 16 (b). It was brought by respondent, Maddrix, to recover

[*] The release stated that "Whereas, the undersigned has demanded overtime pay * * *; and Whereas, the actual amount of overtime pay due * * *, if any such overtime is due, is difficult of ascertainment; and Whereas, there is uncertainty as to whether the undersigned has an enforceable claim; and Whereas, the parties desire to settle said claim without litigation, and thus to avoid the delays and uncertainties incident thereto; Now Therefore, the undersigned, in consideration of the payment to him of the sum of $427.43 * * * accepts said payment as full settlement of all of his claims for overtime employment, and releases and discharges the 'Employer' * * * from any and all claims, debts, damages, or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment as aforesaid, * * *." (R. 11–12.)

The employee testified that he never read the release (R. 24). There was no discussion either of coverage or of the amount between the parties at the time petitioner gave respondent the check (R. 23–24, 54–55, 64–66).

the balance of statutory wages due him under Section 7 together with liquidated damages equal to the entire amount of wages belatedly paid to him.

Maddrix was employed by petitioner as a "working foreman" making boxes and barrels (R. 17) which subsequently moved in interstate commerce (R. 64–65).[4] From October of 1938, the effective date of the Act, until October of 1941, he worked 60 hours a week, and thereafter 57 hours one week and 55 hours the next until the end of his employment in November of 1942, without being compensated as provided by Section 7 (R. 16).

In November of 1942, Dize tendered to Maddrix $500 for wages due and owing under the Fair Labor Standards Act (R. 19). Maddrix accepted the money and signed a general release of all his claims against Dize (R. 19), although both parties

[4] The opinion of the Fourth Circuit states that "Dize contends that he was not engaged in the production of goods for shipment in interstate commerce so as to bring him within the purview of the Act" (R. 64). This question, however, was raised for the first time on appeal to that court. Prior to that time the question was not in issue (R. 14–15). In fact, petitioner in his answer admitted Maddrix was engaged in "the production of goods for commerce within the meaning of the Act" (par. V, R. 6, answering par. V of the Complaint, R. 2). The question of coverage, therefore, was not an issue between the parties at the time of the settlement.

knew that "something in addition appeared to be due" (R. 60).[5]

Shortly thereafter, respondent engaged counsel to recover the balance due him under the Act (R. 31). Before suit was filed, Dize tendered Maddrix' attorney a check for $290.97, the balance of the statutory wages due, but the latter refused to accept the check because it was offered "to bring the matter to an end" without making any payment of liquidated damages (R. 57–58). Suit was thereupon entered for $276.05, the balance of the statutory wages due respondent,[6] and $776.05, liquidated damages equal to the whole amount unlawfully withheld (R. 1–5).

The District Court entered judgment for Maddrix (R. 61) on the authority of *Guess* v. *Montague*, 140 F. (2d) 500, decided by the Fourth Circuit Court of Appeals on September 16, 1943, which held that a settlement or release for less than the full statutory wages due under the Fair Labor Standards Act is void. This judgment was affirmed by the Circuit Court of Appeals (R. 66).

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[5] In September of 1942, an injunction had issued against Dize by consent, prohibiting him from violating the Fair Labor Standards Act (R. 9). Both Dize and Maddrix were in touch with the Wage-Hour inspector at Salisbury who had inspected petitioner's books (R. 19–20), and it was through him that both knew that the amount owed was between seven and eight hundred dollars (R. 20, 31–33).

[6] It was discovered before suit was entered that petitioner had complied with the Act during the last three weeks of Maddrix' employment. The amount of statutory wages sued for was reduced accordingly to $276.05 from $290.97, the amount previously believed to be due (R. 17).

ARGUMENT

I

THE QUESTION OF THE VALIDITY OF THE ALLEGED RELEASES IS A FEDERAL QUESTION GOVERNED BY FEDERAL LAW

In granting certiorari in *Dize* v. *Maddrix*, No. 554, the Court requested counsel to discuss the question whether the validity of the alleged release or accord is governed by federal or by state law. We agree with petitioner, Brooklyn Savings Bank, that the question is governed by federal law (See Brooklyn Savings Bank br., p. 9). In a consistent line of recent decisions by this Court, it has been established that "in the interpretation and application of federal statutes, federal not local law applies" (*Prudence Corp.* v. *Geist*, 316 U. S. 89, 95), and that where a claim is derived from a federal statute, "the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245, 246. See also *Deitrick* v. *Greaney*, 309 U. S. 190, 200–201; *Jerome* v. *United States*, 318 U. S. 101, 104; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 123; *Board of Commissioners* v. *United States*, 308 U. S. 343, 351; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 459, 468–469;

Midstate Horticultural Co. v. *Penna. R. Co.*, 320 U. S. 356; *McKenzie* v. *Irving Trust Co.*, No. 188, this Term, decided January 8, 1945. While particular Federal statutes may be interpreted as adopting rules of state law (see *Board of Commissioners* v. *United States, supra; Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144), the above line of decisions clearly settles the point that state law is not controlling as such, and that it is not to be viewed as adopted by the federal statute where it is inconsistent with or would impair the federal statutory policy. See particularly *Jerome* v. *United States, supra; Sola Electric Co.* v. *Jefferson Electric Co., supra*, and *National Labor Relations Board* v. *Hearst Publications, supra.*

II

THE EFFECT OF A RELEASE UPON LIABILITY UNDER THE FAIR LABOR STANDARDS ACT

Although ordinarily the law permits parties to compromise their disputes, it is well established that a statutory right affecting the public interest may not be waived or released if such a release contravenes the statutory policy. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Midstate Horticultural Co.* v. *Penna. R. R. Co.*, 320 U. S. 356. In the *Midstate Horticultural* case, this Court held that a shipper may not release his right to plead the three-year statute of limitations provided by Section 16 (3) (a) of the Interstate Commerce Act for actions by carriers for the recovery of freight charges, pointing out that "in respect to many matters concerning which

variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required."

Whether or not a statutory right may be released by an individual beneficiary depends upon the intention of Congress as manifested in the particular statute. "Whether the policy of interstate commerce legislation contemplates the one result or the other * * * is the controlling question." *Midstate Horticultural Co.* v. *Penna. R. R. Co.*, 320 U. S. at 360.[7]

These principles unquestionably preclude any legal surrender of the amount of the minimum wages and overtime compensation required to be paid by Sections 6 and 7 of the Fair Labor Standards Act. These sections make it mandatory that employers pay employees the specified minimum wages and overtime compensation. Any contract, whether by way of release or otherwise, whereby an employee is to receive less than the amounts prescribed in these sections is illegal. The decisions are substantially uniform to that effect.[8]

[7] Inasmuch as the nature of the right depends upon the meaning and policy of the particular statute, decisions involving other statutes with different provisions and purposes are not controlling.

[8] All of the decisions of the circuit courts of appeals are in agreement to this extent. *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10), certiorari denied, 320 U. S. 772; *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4);

Much more troublesome and difficult is the question as to the right of an employer to escape liability for liquidated damages by payment of the full amount due under Sections 6 and 7 in return for a release from any further claims. Although the circuit courts of appeals agree that mere payment of the unpaid wages does not abrogate the liability for liquidated damages,* they

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Atlantic Co. v. *Broughton*, 7 Wage Hour Rept. 1168 (C. C. A. 5, 1944); *Post* v. *Fleming*, 7 Wage Hour Rept. 1206 (C. C. A. 2, 1944); *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7); *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2); *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7). Cf. *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602. Virtually all of the decisions of the state courts and of the federal district courts are likewise in agreement that the base requirements of Sections 6 and 7 of the Act cannot be waived or released by private agreement. See *Clarke* v. *126 Fifth Avenue Corp.*, 7 Wage Hour Rept. 427 (S. D. N. Y. 1944); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.); *Hutchinson* v. *Barry*, 50 F. Supp. 292 (D. Mass.); *Engel* v. *Justrite Handkerchief Co.*, 6 Wage Hour Rept. 614 (Sup. Ct. N. Y., 1943); *Fiedler* v. *Potter*, 172 S. W. (2d) 1007 (Sup. Ct. Tenn.); *Cassese* v. *Manufacturers Trust Co.*, 46 N. Y. S. (2d) 621 (N. Y. C. Ct.); *Campbell* v. *Mandel Auto Parts Corp.*, 5 Wage Hour Rept. 56 (Sup. Ct. N. Y., 1941); *Greenbaum* v. *Meadow Provision Co.*, 5 Wage Hour Rept. 919 (Sup. Ct. N. Y., 1942).

For cases inconsistent with the weight of authority, see *Ortiz* v. *Compania Cervecera de Puerto Rico*, 6 Wage Hour Rept. 345 (D. P. R., 1943); *David* v. *Atlantic Co.*, 26 S. E. (2d) 650 (C. A. Ga.); *Thorpe* v. *Nash-Finch Co.*, 5 Wage Hour Rept. 878 (N. D. Okla., 1942); *Rodriguez* v. *Corporation Azucarera Sauri y Subria*, 5 Wage Hour Rept. 956 (D. P. R., 1942).

*See the decisions cited at the beginning of the previous footnote.

are divided as to the binding quality of a payment accompanied by a release.[10] The Second and Seventh Circuits hold such releases void on the ground that the cause of action created by the statute for original and liquidated damages is clearly single and not subject to compromise;[11] the Tenth Circuit is seemingly of the same view.[12] The Fourth and Fifth Circuits, on the other hand, distinguish the liquidated damages on the ground that there is a mandatory obligation imposed by the statute and enforceable by the Government to pay the amounts originally due, but only a personal liability to the employee as to the liquidated damages which is severable and subject to compromise or waiver by him.[13]

The language of the statute is not very explicit on the point. Section 16 (b) merely provides:

> Any employer who violates the provisions of section 6 or section 7 of this Act shall be

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[10] A release is, of course, not binding without consideration. There is consideration in case of a liquidated claim only where there is a *bona fide* dispute as to liability. *Fire Insurance Ass'n., Ltd.*, v. *Wickham*, 141 U. S. 564, 577; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Clark*, 178 U. S. 353, 366. All the circuits agree that a release of the liquidated damages under the Fair Labor Standards Act is invalid unless such a dispute exists. See cases cited in note 8, *supra*.

[11] *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7); *Post* v. *Fleming*, 7 Wage Hour Rept. 1206 (C. C. A. 2, 1944). Cf. *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2).

[12] *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10), certiorari denied, 320 U. S. 772.

[13] *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4); *Atlantic Co.* v. *Broughton*, 7 Wage Hour Rept. 1168 (C. C. A. 5, 1944).

> liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Petitioner in No. 445 contends that the word "unpaid" may be construed as meaning wages not paid at the time suit is instituted, rather than wages unpaid when originally due.[14] But the courts have not adopted the suggested construction, which logically would terminate all liability upon payment of the statutory wage before suit, however tardily, irrespective of a release. All agree that mere payment in itself is insufficient to terminate the statutory liability.[15]

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[14] The circuit courts of appeals have uniformly held that the words "unpaid wages" refer to wages which are "not paid when due in the regular course of employment". See the *Lofton*, *Rigopoulas*, *Birbalas* and *Broughton* cases cited in note 8, *supra* and also *George Lawley & Son Corp.* v. *South*, 140 F. (2d) 439 (C. C. A. 1), certiorari denied, 322 U. S. 746. The Act does not specify a time for payment, but we think it clearly implies that payment must be within a reasonable time. Ordinarily this would be on the payday specified in the contract of employment, but under special circumstances payment of the full amount due under the statute might be lawful if not unreasonably delayed.

[15] This Court refused to grant certiorari as to the question whether recovery of liquidated damages is precluded by the voluntary payment of the full amount of the base pay prior to the institution of the suit. This was the first issue presented in the petition for certiorari in No. 445.

The language of the Act is not helpful in determining whether the employer's liability for liquidated damages was intended to be an integral part of the employee's right to wages, in which the public has an interest, or a purely personal right capable of being surrendered, the point on which the lower courts have divided. Nor are the few references to the liquidated damage clause in the legislative history of the Act of any assistance. 83 Cong. Rec. 9255, 9264.[16]

In the absence of specific light from the words or history of the law, it is necessary to consider the effect of the suggested interpretations upon the accomplishment of the general policy embodied in the Act.

The liquidated damages are required to be paid as compensation to the aggrieved employees, not as a penalty, although of course they also have and were presumably intended to have a deterrent effect upon the employer. They were designed to compensate the employee for the injury suffered over and above the loss of his wages. Inasmuch

[16] Petitioners rely on the fact that the statute, as originally drawn, contained a provision that—

"Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void." (Section 17 (b), S. 2475, as passed by Senate, 75th Cong., 1st Sess., 1937).

This provision was obviously omitted from the bill because considered superfluous. See Brief for Respondent in No. 445, pp. 24–25.

as Section 16 (b) provides separately that the employee should be allowed "a reasonable attorney's fee * * * and costs of the action", it is clear that the object of the liquidated damages was not to reimburse him for the expense of litigation but for the very real, though not readily measurable, harm which results from delay in payment of wages. An employee who is entirely dependent on his wages, and who has no substantial savings, may be unable to pay bills, or insurance premiums, or payments on his home when due. Insurance or property may be lost, or credit impaired, or he may be unable to incur medical expense for himself or his family when needed."[17] In *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583–584, this Court recognized that

> The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.

The very economic inequality between employers and employees which underlies the statute aggravates these consequences. Cf. *Post* v. *Fleming*, 7 Wage Hour Rept. 1206 (C. C. A. 2, 1944).

[17] "For the great number of wage earners who are completely dependent each week upon their wages it is important to receive their pay without delay" and "even a short delay causes hardship" and "brings want and privation." *Labor Laws and Their Administration*, 1936, Bulletin No. 629, United States Department of Labor, Bureau of Labor Statistics, p. 139. (Report of Committee on Wage Collection Laws).

The employee, with his inferior resources, will generally grasp eagerly at the first opportunity to obtain payment of the back wages in cash; the immediate tangible benefit will generally outweigh in his mind full compensation for any damages he may have suffered. And often the employee will be totally unaware that he is entitled to more than the back pay which the employer is offering him. In such cases, even though the employer, who would normally have greater knowledge as to the employee's statutory rights, makes no overt misrepresentation, the release will have been obtained by an overreaching incompatible with the statutory scheme for the compensation of the employee's losses.

The liquidated damage clause, though not a penalty, also serves to effectuate the policy of the statute by discouraging violations. The ease with which an employer can secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that Section 16 (b) should have. If the employer knows that he cannot escape his liability for liquidated damages by taking advantage of the pressing needs of his employees, he will be more likely to comply in the first place.

The effect of permitting liquidated damages to be released upon the accomplishment of the policy of the Act is not entirely one-sided, however. The primary purpose of the statute is to insure compliance with Sections 6 and 7. This primary

object is attained when the wages specified in those sections are paid. Often compliance with these provisions may be more readily secured if settlement can be made on the basis of restitution of the unpaid wages without the liquidated damages. In such cases the liquidated damage clause may be said to have achieved its purpose as a deterrent by inducing payment of the primary amounts due without further delay or the need for litigation.

That the disposition of claims under the Act on the basis of payment of the amount of the unpaid wages is not necessarily inconsistent with the policy of the Act is indicated, at least to some extent, by the practice both of the Administrator and of the Department of Justice. The Administrator has disposed of thousands of cases of violation, with and without litigation, on the basis of restitution of the unpaid wages alone. This occurs in the course of investigations, in which violations are discovered, and also in the negotiation of consent decrees.[18] Often as a practical matter the employer will agree to restitution of the base liability, but not the liquidated damages. The Administrator cannot compel the payment of the latter, and there is a good chance that the employees, or many of them, will never assert their rights themselves. The collection of the base liability, even though it may not fully reim-

[18] See, e. g., *Walling* v. *Miller*, 138 F. (2d) 629 (C. C. A. 8), certiorari denied, 321 U. S. 784.

burse the employees, is in their interest and in conformity with the purposes of the Act. Furthermore, it eliminates some of the competitive advantage which the violating employer may have derived from past underpayments, and also serves as a token of his *bona fide* intent to pay full statutory wages in the future.

In disposing of cases on this basis the Administrator informs employers that the restitution is without prejudice to the employees' rights to liquidated damages under Section 16 (b). Indeed, where the employer insists upon a release from the employees, instead of the usual formal receipt (printed on page 18 of Petitioner's brief in No. 445), the Wage and Hour Division informs the employer that it does not approve or recognize the substitute form. The Administrator is thus extremely careful not to nullify any rights of the employee to liquidated damages; he properly recognizes that he has no authority to enforce or to foreclose such rights.

Nevertheless, both the Administrator and the employer, and also the employees, if they or their representatives participate in the negotiations, probably anticipate that the settlement upon which they agree will in practical effect be final, and that the employees will not sue for liquidated damages. That is generally what happens, particularly with respect to the vast majority of the employees who remain in the service of the employer.

Moreover, the Department of Justice is a party to settlements in which the employees do not receive full liquidated damages. The Department customarily defends actions brought against Government cost-plus contractors for wages due under the Fair Labor Standards Act, inasmuch as the expense of such litigation must eventually be borne by the Government. When employees sue such contractors under the Act, the contracting agency of the Government (customarily the War or Navy Department) makes an independent investigation of the merits of such claims, and if not satisfied that the claims are valid submits the matter to the Administrator of the Wage and Hour Division for determination of liability. The contracting agency accepts his ruling, unless convinced it is clearly erroneous, in which case the matter is submitted to the Assistant Attorney General in charge of the Claims Division of the Department of Justice. If it is decided by the contracting agency, the Administrator, or on appeal by the Assistant Attorney General, that the employee should prevail, the United States Attorney handling the case is directed to negotiate a tentative settlement with the employee's counsel for submission to the contracting agency for acceptance or rejection. The wages due are of course always paid, but the claim for liquidated damages is the subject of bargaining, and almost invariably the employee's counsel is willing to accept considerably less than the total amount of liquidated damages. After payment of

the amount agreed on, a judgment is entered dismissing the suit with prejudice, thereby preventing the employee from seeking to recover more on the same claim.

The factors which we have mentioned suggest, to us, the difficulty and perhaps the inadvisability from the standpoint of the policy of the Act of framing a sweeping generalization that all releases of liquidated damages are either valid or invalid. We do not think, however, that there is great difficulty in distilling from them sufficient of principle to decide the cases now before the Court.

A distinction may be drawn, for example, between situations where the employees' interests were safeguarded by counsel or a government agency, and situations in which dealings took place directly with the employee himself. In the former case, there may be adequate reason for recognizing the release. Where those safeguards are not present, where the employee's inferior bargaining position is accompanied by ignorance of his right to more than the unpaid wages, the obtaining of a full release by the employer in return for payment of only the wages constitutes an overreaching not compatible with the policy of the statute.

These principles, as well as those applicable to releases generally, require, in our view, the conclusion that neither of the releases at bar is valid. Examination of the record in No. 445 indicates that O'Neil, a night watchman, was unaware of his right to an amount in excess of the unpaid wages, and that

the bank carefully refrained from informing him (R. 23–24, 54–55, 64–66, 11–12). This is typical of the situation in which we think that Congress would not have intended an employee to be deprived of the full compensation allowable under the law.

In No. 554, although Maddrix may have known his rights, the original release was void because Dize had not paid even the amount due under Section 7. See p. 10, *supra*. Subsequently a check covering the remainder of the unpaid wages was tendered Maddrix' counsel as full payment of the statutory obligation. Whether or not acceptance of that check by counsel would have constituted a valid release, the check was returned. The informed employee clearly has a right to decide not to settle the claim for less than the total amount of liquidated damages and to insist that the full amount be paid.

Furthermore, we do not think that at the time the releases in these cases were given, there was the *bona fide* dispute as to liability which all the courts hold necessary to supply the requisite consideration. See note 10, p. 12, *supra*.

In No. 445, the employer decided to pay his employees following the decision by this court in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, which clarified the law on coverage of maintenance employees in buildings occupied by producers of goods for commerce. While the release recites

the existence of a doubt as to the employee's coverage and the amount due him, the record indicates the absence of any dispute. The employer simply paid the employee without any argument or even discussion concerning the number of hours worked or coverage under the Act (R. 23). While this voluntary payment of back wages is to the employer's credit, it is quite inconsistent with the existence of an "active controversy" (*Union Producing Co.* v. *Pardue,* 117 F. (2d) 225, 227 (C. C. A. 5)) between the parties. Indeed there would have been no reasonable basis for the existence of any controversy. As already indicated (see *supra* p. 4n), coverage under the Act seemed clear under the *Kirschbaum* decision, and the amount due, far from being in dispute, was computed by the employer himself. The statements in the "form release" (R. 64) intended to indicate the existence of a dispute were certainly not "bona fide and based upon real faith that the demand is not meritorious," but were rather "fabricated for use as a pretext to evade the discharge of an obligation." *Schuttinger* v. *Woodruff,* 259 N. Y. 212.

There was likewise no "active controversy" and no "actual and substantial difference of opinion" *Post* v. *Fleming,* 7 Wage Hour Rept. 1206 (C. C. A. 2)) in the *Dize* case. The employee's demand was made after the employer had consented to the entry of an injunction decree in a suit brought by the Administrator under Section 17 of the Fair

Labor Standards Act (R. 44), which conclusively determined coverage under the Act." See *Birbalas* v. *Cuneo Printing Industries,* 140 F. (2d) 826 (C. C. A. 7). Nor was there any dispute as to the amount due the employee. While the parties were somewhat uncertain as to the exact amount, they were both in touch with the Wage-Hour inspector at Salisbury, Maryland, who had inspected petitioner's books (R. 19–20), and it was through him that both knew that the amount owed was between seven and eight hundred dollars (R. 20, 31–33). No question as to the amount was raised before the court (R. 10–15).

Thus assuming, as we do, that a release of the statutory right to liquidated damages under the Fair Labor Standards Act might be valid under some circumstances (*supra,* pp. 17–20) and if based

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[19] In fact, as indicated above (*supra*, p. 6n), the employer admitted coverage in his answer and only raised this issue, obviously as an afterthought, on appeal to the Fourth Circuit. And it may be noted that the Fourth Circuit summarily rejected petitioner's contention that Maddrix was not covered under the Act, stating: "This case is practically on all fours with *Enterprise Box Co.* v. *Fleming*, 125 F. (2d) 897, cert. den. 316 U. S. 704. * * * Nor are we impressed by the contention of *Dize* that he falls within the exemption set out in Sec. 213 (5) of the Act [for fishermen]. * * * As well might we exempt a manufacturer of rubber boots shipped in interstate commerce to fishermen." Thus, as clearly indicated by the Fourth Circuit, there was no reasonable basis for any dispute on coverage.

on the existence of a *bona fide* dispute, surrender of which is sufficient to constitute a consideration, the releases in the instant cases, we believe, fail to meet that test.

Respectfully submitted,

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JANUARY 1945.

APPENDIX

The pertinent provisions of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., sections 201 et seq. read as follows:

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, * * *

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 16. * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees

affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK,
Petitioner,

v.

WILLIAM J. O'NEIL,
Respondent.

PETITION FOR REHEARING

SEDGWICK, SNEDEKER,
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INDEX

PAGE

STATEMENT 1

POINT I—Last week the Wage and Hour Administrator in his Annual Report to Congress petitioned for legislative relief from the effect of this Court's decision 2

POINT II—It was not necessary for this Court to promulgate a rule which punishes both the willful violator and the employer acting in good faith..... 5

POINT III—The change in the opinion indicates that the conclusion of the majority was based upon a misconception 7

POINT IV—In determining legislative policy the Court has limited its consideration to an exceptional situation not found in the record 11

CONCLUSION 13

CERTIFICATE OF COUNSEL 13

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BROOKLYN SAVINGS BANK,
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PETITION FOR REHEARING

Your petitioner, Brooklyn Savings Bank, respectfully prays that a rehearing be granted pursuant to Rule 33 of the Rules of this Court, in the above cause and for an order staying the judgment of this Court entered herein on April 9, 1945, until final determination of this application.

Statement

On April 18, 1945, the Clerk of this Court advised counsel for the petitioner that Mr. Justice REED, pursuant to a suggestion from the Solicitor General, had modified a sentence on page 9 of the slip opinion.

On April 23, 1945 the Wage and Hour Administrator petitioned Congress for legislation which will in effect overcome the undesirable results of the decision of the majority of the Court.

In order to insure that the full implications of the change in the opinion and the action by the Administrator be made clear to the members of the majority, we feel that it is our duty to petition for rehearing.

POINT I

Last week the Wage and Hour Administrator in his Annual Report to Congress petitioned for legislative relief from the effect of this Court's decision.

On April 23, 1945 the last Annual Report of the Wage and Hour Administrator was released. By virtue of the powers conferred upon him in Section 4a of the Act, he recommended to Congress *inter alia* the following changes in the Act (at p. 7):

> "No legislative device can supplant the need for adequate, continuing and vigorous enforcement for the protection of those who obey the law, as outlined in the preceding section. An important part of this program is the collection of restitution in cases where the employer has failed to pay his employees in accordance with the Act. Such a step benefits the workers denied wages legally due and denies the employer who has violated the Act the advantage which he would otherwise gain over his competitors. The labor laws of several states give the administrative agency in charge of the enforcement of their minimum wage laws power to sue directly to secure the restitution of unpaid wages to the employees upon assignment of their claims. If such a provision were added to Section 16(b) of the Fair Labor Standards Act, it would increase the efficiency of enforcement and facilitate the collection of restitution. This would benefit the great mass of workers denied wages legally due and, *if a provision for waiving the penalty provided by Section 16(b) except in cases of willful and flagrant violations were*

included, employers who voluntarily pay the restitution due would be saved from possible injustice by relief against the threat of further court action. Technical difficulties involved in relating a suit by the Administrator to the employee's right are not insuperable. I recommend that the Congress undertake a study of this whole problem." (Italics ours.)

If the majority had based their decision upon the language used in the statute or upon the Congressional debates or the Conference Report, this action by the Administrator would be a request for a change in the express wording of the statute.

But this Court did not base its conclusion on any such concept. The opinion states it is based on "legislative policy" (p. 6). Therefore, the Administrator does not require legislative amendment of the Act but only judicial construction in conformity with the practical "legislative policy" as he knows it.

Who should know the legislative policy from a practical standpoint better than the Administrator who is enforcing that policy for the legislature? It is unfortunate that this Court was not informed of the knowledge gained by the Administrator from many years of enforcement experience as reflected in his petition to Congress for relief.

The majority felt that it was bound to treat the willful violator and the good faith violator on the same basis in order to protect all employees from the willful violator. It felt that the "legislative policy" which it found would accomplish the greater good for the greater number. It is clear from analysis of the recommended legislation that in the opinion of the Administrator the greater good for the greater number will be accomplished if waiver of the penalty is permitted except in cases of willful and flagrant violations.

There are three basic reasons why legislative policy supports a waiver of liquidated damages where the employer acts in good faith:

FIRST: During the first five years and nine months of the Act the Office of the Wage and Hour Administrator has obtained restitution of unpaid wages amounting to $70,000,000 for two million employees of ninety thousand employers (Annual Report Release April 23, 1945, p. 10). This does not include settlements which were made without intervention of the Administrator. In making these settlements it was contemplated that they "will in practical effect be final, and that the employees will not sue for liquidated damages" (Solicitor's Brief, p. 18).

If two million potential causes of action are created by the decision of the majority of this Court, "the recoil on the public interest would be out of all proportion to the evil sought to be remedied" *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490, 508, January 8, 1945.

SECOND: In failing to uphold waiver of liquidated damages where an employer such as petitioner acts in good faith, this Court felt that "while in individual cases hardship may result the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so that of the community at large" (p. 12). That employees generally will not benefit from the conclusion reached by the majority is borne out by an over-all consideration of the effect of the conclusion of this Court.

This Court's opinion has warned the willful violator and the good faith employer as well, that nothing can be gained by making voluntary restitution of overtime and that payment should be resisted in order that settlement can be effected for less than the 200% upon the basis of a bona fide dispute. If this opinion is to stand, few employers

will ever again voluntarily seek out a former employee to pay him overtime due. If concessions of coverage can be made only under pain of remaining liable for an additional 100% there will be no voluntary restitutions in marginal cases and coverage will be disputed and litigated. The greater good will be served if the greatest possible number of employees are promptly brought within the coverage of the Act rather than that some few employees who have been fairly treated may be permitted to catch at penalties.

THIRD: The decision of the majority has destroyed the Administrator's most effective weapon. For six and one half years he has been making settlements with employers under which he secures concessions of coverage and back pay, but not liquidated damages, for the employees. Such settlements have been the backbone of the administration of the Act. For six and one half years Congress has approved the Administrator's policy of settlement for his Annual Reports are filled with details on "restitutions" secured and "settlements made." The Congressional approval is evidenced by the fact that Congress has not seen fit either to alter this policy or change the statute. Few employers will hereafter concede coverage if it involves confession of judgment for 200% overtime.

POINT II

It was not necessary for this Court to promulgate a rule which punishes both the willful violator and the employer acting in good faith.

As the opinion now stands the Congressional purpose in creating liquidated damages as a sanction is completely nullified. No deterrent effect can be derived from a sanction which affects the guilty and the innocent alike.

The sanction of the statute can only have the intended effect if a rule is established which distinguishes between the willful violator and the good faith employer. Such a distinction is supported by the following:

1. In recommending to Congress that a provision permitting the waiver of liquidated damages (except in a case of willful and flagrant violation) be included in the statute, the Administrator has distinguished between the good and bad faith employer. By this action he indicates that there will be no practical difficulty in distinguishing between the two.

2. This Court has indicated in its opinion that it felt that waivers must be rejected in both cases in order to protect the employees of the willful violator. But the Administrator's experience indicates that if both are to be treated alike, the basic benefits of the Act will be denied to many members of the general class. It thus appears that the only rule which will achieve the end which the Court seeks to accomplish without prejudicing the interests of the members of the general class is a rule which distinguishes between the two.

3. The Court indicates in its opinion that a distinction may be made between good faith and bad faith disputes. If a bona fide dispute may be upheld, this Court should likewise uphold a bona fide waiver.

4. That such a distinction conforms to the intent of Congress is indicated by Section 16(a), which imposes criminal penalties only for willful violations and imprisonment only upon a second conviction.[1]

---

(1) In the instant case the penalty which would be imposed upon the petitioner for non-willful violation of the statute is more than twice the maximum fine imposed upon a willful violator of the statute under Section 16(a).

The conclusion we urge is therefore the only result which is consonant alike with the legislative policy and the intent of Congress.[2]

In order that the benefits to the general class of employees which flow from voluntary concessions of coverage may be restored immediately rather than be denied until relief from this Court's determination can be had from Congress (which could have no retroactive effect), the Court is asked to find that the "legislative policy" requires that waivers of liquidated damages be sustained where restitution of unpaid wages is made voluntarily and where the violation has been neither willful nor flagrant.

POINT III

The change in the opinion indicates that the conclusion of the majority was based upon a misconception.

As originally published the opinion read, at page 9:

> "No power was vested in the Administrator to *bring direct suit* to obtain payment of minimum wages left unpaid and to recover damages arising from the delay in payment."

As changed at the behest of the Solicitor General the opinion now reads:

> "No power was vested in the Administrator to *bring an action at law* to obtain payment of minimum wages left unpaid and to recover damages arising from the delay in payment."

We have italicized the words which were changed.

---

(2) The Chairman of the Senate Conferees in a memorandum in answer to questions presented to him stated:

> "In my opinion, unless this law is carefully and prudently administered, it will tend to increase monopolies and eliminate smaller industries. To be successful, the law, with its commendable humanitarian objects, must be administered with the caution, care and sympathy of a physician and not with the autocracy and force of a police officer" (83 Cong. Rec. 9176-77, 1938).

A careful analysis of the change can leave no doubt that it vitiates not only the sentence and paragraph in which the change was made but also a fundamental premise upon which the entire opinion is based. All members of the Court now know, appreciate and recognize the fact that Congress did give the Administrator power to bring suit to obtain payment of unpaid wages *but not liquidated damages.*

The power of the Administrator to obtain restitution of unpaid minimum wages or overtime compensation as a part of an injunctive proceeding brought to obtain concessions of coverage as to the future, has long been recognized by the Courts and frequently availed of by the Administrator. Not wishing to have this power questioned the Solicitor has requested that the opinion be modified so as to conform to the true facts.

All members of this Court now know that Congress endowed the Administrator with power to collect unpaid wages *but not liquidated damages* because the overtime is affected with a public interest but the liquidated damages are not. Furthermore, in criminal proceedings the Administrator has the power to obtain restitution of unpaid minimum wages or unpaid overtime compensation *but not liquidated damages* (see Annual Report of the Wage and Hour Administrator, 1939, pp. 67 and 68; 1941 Annual Report, p. 45).

The statement in the decision that "The Administrator was given limited enforcement powers" (p. 9), may not properly be applied to recovery of unpaid minimum wages or unpaid overtime compensation. Congress gave him the broadest of powers because it felt they were affected with a public interest. In so far as liquidated damages are concerned, the Administrator's powers are non-existent because Congress felt that such damages were not affected with a public interest.

And when the opinion states: "The Administrator's civil remedy lay by way of suit for an injunction which by

its nature tends to be prospective in operation" (p. 9), the opinion does not state the fact.

The sentence following the changed sentence reads: "Sole right to bring such suit was vested in the employee under Section 16(b)." That, of course, is not so. The Administrator in his action "in equity" or in a criminal proceeding may secure for the employee restitution of unpaid wages.

Is it credible that if Congress had deemed the liquidated damages to be similarly affected with a public interest, it would have given the Administrator the power, at the public expense, to bring suit or criminal proceedings to obtain restitution of back wages alone and compelled the employee to relitigate the same issues in order to obtain payment of liquidated damages?

It is indeed significant that neither the Wage and Hour Administrator, the Solicitor General of the United States, nor the Assistant Attorney General in charge of the Claims Division of the Department of Justice ever found liquidated damages to be affected with a public interest (Solicitor's Brief, pp. 18 and 19).

The function of the Administrator under the Fair Labor Standards Act is no different than the function of the Administrator under any other Act of Congress, namely: to compel compliance with all provisions of the Act which are affected with a public interest.

The effect of this change is likewise felt in the latter part of the opinion. For when the majority opinion states (p. 10): "One section, Section 16(b) creates the obligation for the entire remedy. Collection of both wages and damages is left to the employee," it is, of course, begging the question since collection of wages is left to the employee *or* the Administrator while collection of damages is left to the employee alone. Earlier in the same paragraph, the Court indicates that Section 16(b) is mandatory in form. The

fact is that there is not a single word in the entire statute that directs the employer to pay liquidated damages. Failure to pay liquidated damages is not even declared to be a prohibited act or unlawful act by Section 15.

Section 16(b) does not provide "that the employer shall be liable for liquidated damages in an amount equal to the minimum wages overdue (p. 10);". The word used in the statute is "unpaid."

When the misapprehension as to the powers of the Administrator in civil and criminal proceedings is removed it is apparent that the nature and purpose of liquidated damages are basically altered, for they no longer remain the sole sanction to compel payment of unpaid wages.

The majority opinion at (p. 11) indicates that there is no reason for making an employer subject to criminal penalties or injunction for failure to pay liquidated damages because they are collectible by the employee. Does the majority wish to infer that whether a right is affected with public interest or not can in any way depend upon who asserts the right? Unpaid wages may likewise be collected by the employees, yet Congress has indicated that it felt that the wage provision should be enforced by the Administrator as well through both civil and criminal proceedings.

Can it be reasonably contended that if Congress had deemed liquidated damages to be affected with a public interest, the recovery of such sum would have been left to the discretion of the individual employee who may never sue either

(a) because he is unaware of his rights; or

(b) because he believes the employer acted in good faith; or

(c) because he is unable to assert his right by reason of his unequal bargaining power or position?

The cases cited in the majority opinion (Footnotes 14 and 30) as authority for the proposition that absence of non-waiver provisions in other statutes has not prevented the Courts from invalidating waivers, all involved waiver of rights unquestionably affected with a public interest and declared so to be in the statutes there considered. In those cases it was not necessary for the Court to clothe the rights with a public interest by judicial implication. In no case did they involve waiver of mere private damages.

> "* * * it is beyond the judicial power of innovation to supply a direct prohibition by construction." *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 508.

POINT IV

In determining legislative policy the Court has limited its consideration to an exceptional situation not found in the record.

This is not a case of withholding minimum wages.

O'Neil was promptly paid wages at a rate in excess of the minimum prescribed in the statute as required by the collective bargaining agreements.

The respondent did not suffer any evil effects from delay in the payment of wages because he never deemed himself entitled to any statutory overtime any more than did the employer, Local 32B of the Building Employees Union, which represented him, or the four Appellate Courts which passed upon the matter prior to the *Kirschbaum* decision.

Here there was no "lump sum" (p. 8) payment, nor is there any "difficult problem of allocation" (p. 8). The petitioner did not "gamble on evading the Act" (p. 9) and it did not "secure a release from a worker who needs his

wages promptly (p. 9) * * *," because he is relying on their payment each week. "Reparations to restore damages done" (p. 8) and "compensation for the retention of a working man's pay" (pp. 7-8) are hardly appropriate under the facts of this case where the record indicates that the employer acted in the best of faith.

Furthermore, the overtime provisions of the Act are equally applicable to an employee whose basic rate may be many times the statutory minimum.

The majority opinion indicates that their conclusion is required in order to prevent the bad faith violator from taking advantage of his employee's unequal bargaining position, but the statute provides ample sanctions to deal with a willful violator. Such an employer would in no way avoid the obligation of paying overtime compensation and would subject himself to criminal liability and the possibility of damages of 100% and counsel fees for any period unaccounted for. The sole advantage that could be obtained by this foolhardy practice would be a delay which could only be for a short time.

Furthermore, in the experience of the Administrator the willful violator is practically non-existent. The 1941 Annual Report of the Administrator indicates (p. 45) that out of 10,575 cases during the first three years of the Act only 41 required criminal action. Civil action to obtain restitution was necessary in only 912 cases.

To summarize our position, liquidated damages, as such, are not affected with a public interest. When a willful violator of the statute secures a waiver of liquidated damages from his employee—that waiver violates the legislative policy of the statute. But when an employer acting in good faith makes voluntary restitution and secures a waiver from his employee—that waiver does not violate the legislative policy of the statute.

CONCLUSION

Since the majority of the Court have (a) benefited a small number of employees at the expense of the vast majority; (b) nullified the most effective weapon of the Wage and Hour Administrator; and (c) imposed an unwarranted burden upon an employer acting in good faith, it is respectfully submitted that the petition for rehearing should be granted.

Respectfully submitted,

SEDGWICK SNEDEKER,
JOSEPH V. LANE, JR.,
Counsel for Petitioner.

Of Counsel:
SNEDEKER & SNEDEKER,
CUMMINGS & STANLEY.

Certificate of Counsel

We, SEDGWICK SNEDEKER and JOSEPH V. LANE, JR., hereby certify that the within petition is presented in good faith and not for delay.

Dated, New York, May 3, 1945.

SEDGWICK SNEDEKER,
JOSEPH V. LANE, JR.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

Nos. 445, 554 and 421.—October Term, 1944.

445	Brooklyn Savings Bank, Petitioner, *vs.* William J. O'Neil.	On Writ of Certiorari to the Court of Appeals of the State of New York.
554	L. Elwood Dize, Trading as Dize Box Company, Petitioner, *vs.* Lake Maddrix.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
421	Arsenal Building Corporation and Spear & Co., Inc., Petitioners, *vs.* Meyer Greenberg, Suing in Behalf of Himself and Other Employees and Former Employees of Defendants Similarly Situated.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 9, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

The writs of certiorari granted in these three cases present questions as to the interpretation of Section 16(b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, at 1069, which provides that an employer who violates the minimum wage and maximum hour provisions of the Act ". . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages . . . ."[1] Cases No. 445 and No. 554, raise the question whether

[1] Section 16(b) provides:
"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

an employee subject to the terms of the Act can waive or release his right to receive from his employer liquidated damages under Section 16(b). Case No. 421 presents the issue of whether in a suit brought pursuant to the provisions of Section 16(b) the employee is entitled to interest on sums recovered as wages and liquidated damages under that section. Since these three cases involve similar problems relating to the interpretation of Section 16(b) and the Congressional policy behind its adoption, all three cases will be dealt with in one opinion. See also No. 462 decided today.

No. 445.

The petitioner, Brooklyn Savings Bank, owned and operated an eleven story office building in which the respondent was employed as a night watchman during a two year period from November 5, 1938, to August 30, 1940. Since a substantial portion of that building was devoted to the production of goods for commerce,[2] the respondent was entitled to overtime compensation under the provisions of Section 7 of the Fair Labor Standards Act.[3] 52 Stat. 1063. No such compensation was paid at that time. However, in November, 1942, over two years after the respondent had left petitioner's service, the petitioner computed the statutory overtime compensation due the respondent and offered him a check for $423.16 in return for a release of all of his rights under the Act. The respondent signed the release and took the check. Since this sum did not include any payment for liquidated damages provided for in Section 16(b) of the Act, the respondent subsequently instituted the present proceeding in a New York

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[2] The New York Appellate Term held that the Fair Labor Standards Act applied to the petitioner's operation of its building. This holding was affirmed by the Appellate Division and the Court of Appeals. See notes 5 and 6. Petitioner did not raise this issue in his petition for certiorari.

[3] Section 7(a) provides:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

City Municipal Court to recover liquidated damages due him under Section 16(b). The complaint was dismissed on the grounds that respondent failed to prove a cause of action and also that the respondent "released any claim for liquidated damages or counsel fees." The Appellate Term reversed, per curiam, holding that respondent was employed in the production of goods for commerce within the meaning of the Fair Labor Standards Act and was entitled therefore to recover liquidated damages by reason of petitioner's default in making overtime payments as required by Section 7 of the Act.[4] This decision was affirmed by the New York Appellate Division,[5] and by the New York Court of Appeals.[6] Since the New York Court of Appeals decided a federal question of substance not heretofore determined by this Court, we granted certiorari[7] limited to the question of whether the respondent's release of all further claims and damages under the Act, given at the time he received payment of the overtime compensation due under the Act, is a defense to an action subsequently brought solely to recover liquidated damages. The jurisdiction of this Court rests on Section 237(b) of the Judicial Code.

No. 554.

The petitioner in this second case operated a box factory in which he employed the respondent during the period from October, 1938, the effective date of the Fair Labor Standards Act, to November, 1942, when respondent was discharged. During this period the respondent worked hours in excess of the statutory maximums in effect during this period. Petitioner failed to pay respondent time and one-half for overtime as required by the Act. In September, 1942, the Wage and Hour Administration procured an injunction, by consent, prohibiting the petitioner from violating the Act. In November, 1942, the petitioner tendered the respondent $500 for wages due and owing under the Act, the latter accepting the money and signing a general release of all claims against petitioner under the Act. Both parties knew at this time that more than $500 was due to respondent for minimum wages and overtime pay under the Act. Shortly thereafter, the respondent engaged counsel to recover the balance due

4 O'Neil *v.* Brooklyn Savings Bank, 180 Misc. 542.

5 O'Neil *v.* Brooklyn Savings Bank, 267 App. Div. 317.

6 Affirmed without opinion.

7 323 U. S. —.

him under the Act. Petitioner, before suit was filed, tendered the balance of the statutory wages due, but respondent refused to accept it because it did not include an equal sum for liquidated damages. Thereupon the respondent brought suit for $276.05, the balance of the statutory wages due respondent, and $776.05, being liquidated damages equal to the whole amount ($500 plus $276.05) which had originally been unlawfully withheld. In his answer, the petitioner pleaded settlement of respondent's claim for $500, the release given by respondent pursuant to such settlement, and the petitioner's subsequent tender of a check for the deficiency in statutory minimum and overtime wages due. The District Court granted judgment for the respondent relying on *Guess* v. *Montague*, 140 F. 2d 500, which held invalid a settlement agreement on the part of employees to accept less than the statutory minimum wage.[8] The Circuit Court of Appeals for the Fourth Circuit affirmed.[9]

Because the decision of the Circuit Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court, we granted certiorari[10] limited to the question of whether there had been a compromise of respondent's claim. Jurisdiction of this Court rests on Section 240(a) of the Judicial Code.

The petition in No. 445 raises the question of whether an employee, accepting from his employer a delayed payment of the basic statutory wages due under the Act, can validly release and waive any further right to recover liquidated damages under the provisions of Section 16(b).[11] A preliminary question arises as to whether respondent's release was given in settlement of a bona fide dispute between the parties with respect to coverage or amount due under the Act or whether it constituted a mere waiver of his right to liquidated damages. The state courts made no findings of fact on this issue. Where a state court fails to pass on evidence or make findings of fact because under their respective views the facts referred to are immaterial, we are not relieved

[8] Maddrix v. Dize, 7 Wage Hour Rep. 313 (Jan. 31, 1944, not officially reported).

[9] Dize v. Maddrix, 144 F. 2d 584.

[10] 323 U. S. —.

[11] See note 4 *supra*.

from the duty of examining the evidence for the purpose of determining what facts reasonably might be and presumably would be found therefrom by the state court. *Merchants' Natl. Bank* v. *Richmond*, 256 U. S. 635, 638; *Carlson* v. *Curtiss*, 234 U. S. 103, 105. Cf. *United Gas Co.* v. *Texas*, 303 U. S. 123, 143; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261. We think the record in this case shows that the release was not given in settlement of a bona fide dispute between employer and employee. Petitioner undertook to pay the respondent after our decision in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, which determined the applicability of the Fair Labor Standards Act to building operators like the petitioner. Petitioner's answer in the Municipal Court merely relied upon payment of the statutory liability and the release of other claims. With the exception of the recital in the release, there is nothing in the record which shows that the respondent's release was obtained as the result of the settlement of a bona fide dispute between the parties with respect to coverage or amount.[12] Moreover, the decision by the New York Appellate Division was based on *Rigopoulos* v. *Kervan*, 140 F. 2d 506, which involved waiver of right to liquidated damages in the absence of a bona fide dispute and which expressly reserved decision on the question of validity of a settlement where there was such a dispute between the parties. The issue presented in No. 445 therefore is whether in the absence of a bona fide dispute between the parties as to liability, respondent's written waiver of his right to liquidated damages under Section 16(b) bars a subsequent action to recover liquidated damages. We are of the opinion that it does not bar such claim.[13]

It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release

[12] The respondent, employee, was informed by a third person some two years after he left the petitioner's employment that petitioner had some money for him. Respondent went to petitioner's offices. According to respondent's testimony, there was no discussion or dispute prior to his acceptance of the check given him by the petitioner either as to the existence of liability under the Act or as to the amount of such liability. Viewed most favorably petitioner's witness' testimony was merely to the effect that the petitioner had subjective doubts as to the existence and amount of its liability.

[13] For a general discussion of the problem raised by this case, see Herman, The Administration and Enforcement of the Fair Labor Standards Act, 6 Law and Contemp. Probs. 368; Tepper, Consent Judgments and Contempt Cases under the Fair Labor Standards Act of 1938, 22 Boston Univ. L. Rev. 390; Determination of Wages under Fair Labor Standards Act, 43 Col. L. Rev. 355; 57 Harv. L. Rev. 257.

contravenes the statutory policy. *Midstate Horticultural Co., Inc.* v. *Pennsylvania Railroad Co.*, 320 U. S. 356, 361; *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667. Cf. *Young* v. *Higbee Company*, 323 U. S. —, —. Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.[14] With respect to private rights created by a federal statute, such as Section 16(b), the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute. As was stated in *Midstate Horticultural Co.* v. *Pennsylvania Railroad Co.*, 320 U. S. 356, 360, ". . . whether the policy of . . . [the] legislation contemplates the one result or the other . . . is the controlling question."

Neither the statutory language, the legislative reports[15] nor the debates[16] indicates that the question at issue was specifically considered and resolved by Congress. In the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in and structure of the Act. See *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 597; *United States* v. *Darby*, 312 U. S. 100, 117-18, 122-23. Such consideration clearly shows that Congress did not

[14] See United States *v.* Morley Const. Co., 98 F. 2d 781, 788; N. L. R. B. *v.* American P. & C. Corp., 113 F. 2d 232, 118 F. 2d 630; N. L. R. B. *v.* Stackpole Carbon Co., 128 F. 2d 188, 190; Waterman S. S. Corp. *v.* N. L. R. B., 119 F. 2d 760; Perry *v.* W. L. Huffman Automobile Co., 104 Neb. 211, reversed on rehearing, 104 Neb. 214; Harrington *v.* Dept. of Labor & Industry, 252 Mich. 87.

[15] The provisions of Section 16(b) appeared for the first time in the bill reported by a Conference Committee of both Houses. The Committee report simply stated, H. Rep. No. 2738, 75th Cong., 3d Sess., p. 33:

"Section 16 of the conference agreement provides a fine of not more than $10,000, or imprisonment for not more than 6 months, or both, for violations of the act. No person is to be imprisoned upon conviction for a first offense. This section also provides for civil reparations for violations of the wages and hours provisions. If an employee is employed for less than the legal minimum wage, or if he is employed in excess of the specified hours without receiving the prescribed payment for overtime, he may recover from his employer twice the amount by which the compensation he should have received exceeds that which he actually received."

There were three legislative reports on predecessor bills but these bills did not contain any provision analogous to Section 16(b). S. Rep. No. 884, 75th Cong., 1st Sess.; H. Rep. No. 1452, 75th Cong., 1st Sess.; H. Rep. No. 2182, 75th Cong., 3d Sess.

[16] As indicated in note 15, *supra*, Section 16(b) was first incorporated into the Fair Labor Standards Act of 1938 in the bill reported out of the Conference Committee of both Houses. The debates in both Houses prior to adop-

intend that an employee should be allowed to waive his right to liquidated damages.

The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce.[17] The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.[18] To accomplish this purpose standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

We have previously held that the liquidated damage provision is not penal in its nature but constitutes compensation for the

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tion of the Conference report were quite brief. 83 Cong. Rec. 9158-78, 9246-67. The only reference to Section 16(b) was by Representative Keller who stated, 83 Cong. Rec. p. 9264:

"Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. The provision has the further virtue of minimizing the cost of enforcement by the Government. It is both a common-sense and economical method of regulation. The bill has other penalties for violations and other judicial remedies, but the provision which I have mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act."

[17] H. Rep. No. 2738, 75th Cong., 3d Sess., pp. 1, 13, 21 and 28.

[18] The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage. 81 Cong. Rec. 7652, 7672, 7885; 82 Cong. Rec. 1386, 1395, 1491, 1505, 1507;; 83 Cong. Rec. 7283, 7298, 9260, 9265. See also H. Rep. No. 1452, 75th Cong., 1st Sess., p. 9; S. Rep. No. 884, 75th Cong., 1st Sess., pp. 3-4.

retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living "necessary for health, efficiency and general well-being of workers"[19] and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.[20] Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date. The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes. Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damage is called for. This conclusion is in accord with decisions of the majority of the federal courts that have considered this question.[21] This result, moreover, avoids the difficult problems of allocation that would arise in numerous cases where a lump sum was paid for back wages and waiver of right to liquidated damages and where issue

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[19] Section 2(a), 52 Stat. 1060.

[20] The necessity of prompt payment to workers of wages has long been recognized by Congress as well as by state legislatures. Numerous statutory provisions have been adopted to insure prompt payment. See for example, 33 U. S. C. (§ 596; 46 U. S. C. (§ 914(e) and (f); Wis. Rev. Stat. 1941, § 103.39; N. Y. Labor Law, [illegible], § 196; Calif. Labor Code, 1937, §§ 205, 219.

As to the importance to the worker of receiving prompt payment, see Labor Laws and their Administration, 1936 Bull. No. 629, U. S. Dept. of Labor, Bureau Labor Statistics, p. 139.

[21] Post, et al. *v.* Fleming, et al., 7 Wage Hour Rep. 1206 (Dec. 14, 1944); Seneca Coal & Coke Co. *v.* Lofton, 136 F. 2d 359; Rigopoulos *v.* Kervan, 140 F. 2d 506; Birbalas *v.* Cuneo Printing Industries, 140 F. 2d 826; Travis *v.* Ray, 41 F. Supp. 6; Hutchinson *v.* William C. Barry, Inc., 44 F. Supp. 829. *Contra*: Guess *v.* Montague, 140 F. 2d 500.

There has been less unanimity over the right to compromise claims under the statute in cases involving a bona fide dispute. See Atlantic Company *v.* Broughton, 7 Wage Hour Rep. 1168 (Dec. 4, 1944); Post et al. *v.* Fleming, et al., *supra;* Fleming *v.* Warshawsky & Co., 123 F. 2d 622; Donahue *v.* Susquehanna Collieries Co., 138 F. 2d 3; Rigopoulos *v.* Kervan, *supra;* David *v.* Atlantic Co., 69 Ga. 643. For discussion of the release and

was subsequently raised as to whether there had been full payment of the basic minimum and overtime wages specified in the Act. Nor does the instant case involve exceptional circumstances of the kind held to justify a waiver agreement such as was upheld in *Fort Smith & Western R. Co.* v. *Mills*, 253 U. S. 206.

The private-public character of this right is further borne out by an examination of the enforcement provisions of the Act. Although the difficulties of enforcement under the Act were recognized,[22] the Administrator was given limited enforcement powers. Criminal prosecution was available only for willful violations—difficult to prove. Section 16(a). The Administrator's civil remedy lay by way of suit for an injunction, which by its nature tends to be prospective in operation. No power was vested in the Administrator to bring ~~direct suit~~ to obtain payment of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right to bring such suit was vested in the employee under Section 16(b). Although this right to sue is compensatory, it is nevertheless an enforcement provision.[23] And not the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum left unpaid. To permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that Section 16(b) should have. Knowledge on the part of the employer that he cannot escape liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place. To allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy.[24]

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settlement problem as it has arisen under the state Workmen's Compensation Acts, See Dodd, Administration of Workmen's Compensation, 186 *et seq.*

For lower federal court decisions holding that right to unpaid minimum wages and overtime compensation constitute a single right, see Post, et al. *v.* Fleming, et al., *supra*; Birbalas *v.* Cuneo, *supra*. Cf. Buckley *v.* Oceanic S. S. Co., 5 F. 2d 545.

22 See statement by Secretary of Labor, Joint Hearings, Committee on Education and Labor, United States Senate, and Committee on Labor of House of Representatives, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, Part 1, p. 181. See also note 16, *supra*.

23 Joint Hearings, *op. cit.*, *supra*, note 22, Part 2, p. 457. See also note 16, *supra*.

24 See Sage *v.* Hampe, 235 U. S. 99, 105; Smith *v.* McCullough, 270 U. S. 456, 465; Muschany *v.* United States, 323 U. S. —, —.

Prohibition of waiver of claims for liquidated damages accords with the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto, unless expressly exempted by the provisions of the Act. An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor.[25] The same considerations calling for equality of treatment which we found so compelling in *Midstate Horticultural Co., Inc., supra,* exist here.

The provisions of the statute reflect the policy considerations discussed above which prohibit waiver of the right to liquidated damages. Sections 7(a) and 16(b) are mandatory in form. In terms they direct that the employer shall not employ a worker longer than the specified time without payment of overtime compensation and that upon violation of this provision, the employer shall be liable for statutory wages and liquidated damages. One section, Section 16(b), creates the obligation for the entire remedy. Collection of both wages and damages is left to the employee.[26]

Respondent argues that Section 16(b) indicates that the right to liquidated damages arises only if the employee is compelled to sue for minimum wages due. Section 16(b) in no way bears out this interpretation.[27] It provides absolutely that the employer shall be liable for liquidated damages in an amount equal to minimum wages overdue; liability is not conditioned on default at the time suit is begun. It is also argued that the elimination from a predecessor bill of a provision prohibiting waiver of the provisions of the Act indicates a Congressional intent to allow an employee to waive his claim to liquidated damages.[28] But

[25] H. Rep. No. 2182, 75th Cong., 3d Sess., pp. 6-7, states: "There are to be no differentials either between sections of the United States, between industries, or between employers. No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors. No employee in any part of the United States in any industry affecting interstate commerce need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes."

[26] Section 16, 52 Stat. 1069.

[27] See note 1, *supra.*

[28] Section 20(a) and (b) of the original bills introduced into the House and Senate provided as follows:

"SEC. 20. (a) Any contract, agreement, or understanding for the employment of any person in violation of any provision of this Act or of a regulation or order thereunder shall be null and void.

"(b) Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void."

such a contention proves too much. It applies with equal force to the right to minimum wages. Such an interpretation would nullify the effectiveness of the Act. It is also suggested that the failure to impose criminal sanctions for the violation of the liquidated damage provisions or to authorize an injunction to prevent their violation manifests a difference in Congress' attitude toward the waiver of the employee's right to the basic statutory wage as compared with his right to liquidated damages. But there is no reason for making an employer subject to a criminal penalty or an injunction for failure to pay liquidated damages. They are collectible as private damages by the employee for failure to obey the same requirements as to wages which are punished and controlled, so far as the purely public interest is concerned, by criminal sanctions and injunction.

Petitioner relies on the fact that various other federal statutes authorizing employees to sue for wages or for damages arising from injuries sustained in the course of employment contain specific provisions prohibiting waiver of rights under the acts involved, or provide means by which compromises and settlements can be approved.[29] There is no indication why Congress did not embody a similar provision in the Act under consideration in this case. Absence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative policy would be thwarted by permitting such contracts.[30] The decision in the

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S. 2475, 75th Cong., 1st Sess., introduced May 24, 1937; H. R. 7200, 75th Cong., 1st Sess., introduced May 24, 1937.

Except for renumbering of the section and one slight change in language, this provision remained in the bill and its various amendments, apparently until it was eliminated by the Conference Committee. Section 17, S. 2475, Calendar No. 905, [Report No. 884], 75th Cong., 1st Sess., reported with an amendment, July 6, 1937; Section 17, S. 2475, Union Calendar No. 535 [Report No. 1452], 75th Cong., 1st Sess., reported with amendment, Aug. 6, 1937; Section 16, S. 2475, 75th Cong., 2d Sess., amended and recommitted, Dec. 17, 1937. The reason for eliminating this provision from the final bill does not appear. It was done in the course of the general revision of the bill in the Conference Committee.

[29] The following federal statutes contain express provisions relating to the waiver or settlement of claims under them: Longshoremen's and Harbor Workers' Comp. Act, 33 U. S. C. §§ 908(i), 915(b), 916; Federal Employers' Liability Act, 45 U. S. C. § 55; Jones Act, 46 U. S. C. § 688; settlement of wage claims of merchant seamen, 46 U. S. C. §§ 597, 644. The federal courts have interpreted these provisions strictly so as to protect the employee. Garrett *v.* Moore-McCormack Co., 317 U. S. 239; Duncan *v.* Thompson, 315 U. S. 1; Pacific Mail S. S. Co. *v.* Lucas, 258 U. S. 266; Arrow Stevedore Co. *v.* Pillsbury, 88 F. 2d 446; Pacific Employers Ins. Co. *v.* Pillsbury, 130 F. 2d 21; Henderson *v.* Glen Falls Indemnity Co., 134 F. 2d 320; Westenrider *v.* United States, 134 F. 2d 772.

[30] See note 14, *supra.*

instant case is based on the legislative policy behind this enactment and issues arising under other acts having different legislative backgrounds are not conclusive in determining the legislative intent with respect to the Fair Labor Standards Act. Failure to provide a method of waiving claims under the Act can support contrary inferences, that such waivers were to be allowed or that the provisions of the Act state a settled policy which cannot be modified by private contracts. We are of the opinion that the legislative history and provisions of the Act support a view prohibiting such waiver. As was stated in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 397, "'while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large.' [*Adkins* v. *Children's Hospital*, 261 U. S. 525.] Id., p. 563."

The invalidity of the release or waiver in No. 445 makes the release and waiver involved in No. 554 a fortiori invalid. In the latter case both the federal District Court[31] and the Circuit Court of Appeals[32] found "that both parties knew more than $500.00 was due . . . ." at the time the petitioner tendered $500 to the respondent in return for a comprehensive release covering all of the respondent's claims against the petitioner employer. Thus in that case the employer and employee attempted by means of that release to waive the right to the basic statutory minimum as well as the right to liquidated damages. This attempted release and waiver of rights under the Act was absolutely void. See *Smith* v. *McCullough*, 270 U. S. 456, 465. When petitioner attempted to pay the additional sum due as a statutory minimum, the respondent refused to accept payment, thus there was no valid settlement which would operate to bar the respondent employee's right to recover the balance of the statutory minimum wage still due and liquidated damages equal in amount to the entire sum of wages which the employer had not paid promptly.

Our decision of the issues raised in No. 445 and No. 554 has not necessitated a determination of what limitation, if any, Section 16(b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement. Neither of the above mentioned cases presented

[31] 7 Wage Hour Rep. 313.
[32] 144 F. 2d 584, 585.

such issues for our consideration. Cf. *Duncan* v. *Thompson*, 315 U. S. 1, 7; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239; *Tennessee Coal. Co.* v. *Muscoda Local*, 321 U. S. 590, 603.

There remains to be considered the question whether an employee recovering minimum wages and liquidated damages under the provisions of Section 16(b) is also entitled to interest on the sums so recovered.[33] We granted certiorari in No. 421[34] to the Circuit Court of Appeals for the Second Circuit, limited to the question of the propriety of allowing interest on recoveries of unpaid overtime compensation and liquidated damages under the Act. Certiorari was granted because this court decided an important federal question of substance which had not previously been determined by this Court. The jurisdiction of this Court in No. 421 rests on Section 240(a) of the Judicial Code.

We are of the opinion that the question of the right to interest on sums recoverable under the provisions of Section 16(b) of the Act constitutes a question of federal, not local, law. *Board of Commissioners* v. *United States*, 308 U. S. 343, 349-50; see *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239. Interest is not recoverable on judgments obtained under Section 16(b). As was indicated in our decision in *Overnight Motor Co.* v. *Missel*, *supra*, Section 16(b) authorizes the recovery of liquidated damages as compensation for delay in payment of sums due under the Act. Since Congress has seen fit to fix the sums recoverable for delay, it is inconsistent with Congressional intent to grant recovery of interest on such sums in view of the fact that interest is customarily allowed as compensation for delay in payment. To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages. See *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296. Allowance of interest on minimum wages and liquidated damages recoverable under Section 16(b) tends to produce the undesirable result of allowing interest on interest.

[33] In No. 445 the New York Appellate Term allowed interest on unpaid liquidated damages. O'Neil v. Brooklyn Savings Bank, 180 Misc. 542. This was affirmed on subsequent appeals to higher state courts. See notes 5 and 6 *supra*. Since petitioner in No. 445 did not seek certiorari on this issue, we have not examined it. Connecticut Ry. Co. v. Palmer, 305 U. S. 493, 495. The federal District Court and Circuit Court of Appeals in No. 554, did not award the employee in that case interest on sums adjudged due as unpaid overtime wages and liquidated damages.

[34] 323 U. S. —.

See *Cherokee Nation* v. *United States*, 270 U. S. 476, 490. Congress by enumerating the sums recoverable in an action under Section 16(b) meant to preclude recovery of interest on minimum wages and liquidated damages.[35]

The judgments in No. 445 and No. 554 are hereby affirmed. The judgment in No. 421 is reversed in so far as it included interest.

[35] See note 1, *supra*.

Mr. Chief Justice STONE, dissenting in No. 445 and concurring in No. 554.

Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and I think the judgment should be reversed in *Brooklyn Savings Bank* v. *O'Neil*, No. 445, and affirmed in *Dize* v. *Maddrix*, No. 554.

No. 445.

Respondent was employed by petitioner in New York, and in New York gave to petitioner, without consideration, a purported written release of its obligation to pay the statutory liquidated damages prescribed by § 16(b) of the Fair Labor Standards Act. Section 243 of the Debtor and Creditor law of New York declares a written instrument purporting to release "all claims, debts, demands or obligations . . . shall not be invalid because of the absence of consideration or of a seal." Counsel are agreed that, unless the words or policy of the Fair Labor Standards Act preclude, the written release was as effective to discharge the obligation for liquidated damages as was the release under seal at common law.

We find nothing in the Fair Labor Standards Act to prevent the effective operation of such a release upon the cause of action for liquidated damages more than any other. Section 16(b) of the Act authorizes the employee to recover liquidated damages from an employer who violates the duty imposed by §§ 6 and 7 of the Act to pay the prescribed minimum and overtime wages. That duty is expressed in §§ 6 and 7 in terms of a command to the employer. Willful failure to obey it is made a criminal offense by §§ 15(a)(2) and 16(a), and authority to enjoin violations of §§ 6 and 7 is given by §§ 15 and 17.

These provisions and these alone afford some basis for inferring a Congressional policy against the release of minimum and over-

time wages. But the Act places the right to recover liquidated damages authorized by § 16(b) on a very different footing. That section expresses no command. It merely imposes a civil liability on the employer and gives an action to the employee to enforce the liability. Failure by the employer to pay the prescribed liquidated damages is not made a criminal offense by §§ 15 and 16 and may not be enjoined under §§ 15 and 17.

The studious avoidance of any provision making the non-payment of the liquidated damages a public wrong, by the omissions of sanctions which the statute does impose for the failure to pay minimum and overtime wages, is the most persuasive kind of evidence that it was the Congressional purpose to leave undisturbed the general policy of the law that a mere private claim for damages may be released at the will of the claimant. It is not an answer to say that "there is no reason for making an employer subject to a criminal penalty or an injunction for failure to pay liquidated damages", since they are "collectible as private damages." It is precisely because the statute in this case has in every respect treated the claim for liquidated damages as a private claim while imposing sanctions, as for a public wrong, for non-payment of minimum and overtime wages, that we must infer that Congress intended that the claim for liquidated damages should have the status of private claims, which are subject to release, a status which the statute denied to minimum and overtime wages.

This pointed difference in the treatment of the two classes of claims is underscored by the complete lack of any legislative history suggesting that there was any Congressional purpose to treat alike the two classes of claims which it treated so differently in the statute. In its progress through Congress there was stricken from the bill, which was finally enacted as the Fair Labor Standards Act, a clause providing that any agreement for waiver of compliance with any provision of the Act should be void. Section 17(b), S. 2475, as passed by Senate, 75th Cong., 1st Sess., 1937. With this provision eliminated, the mandatory terms of §§ 6 and 7, the criminal penalties of the Act, and its provision for relief in equity, afford the sole ground to be found either within or without the statute for any inference of a Congressional policy against the release of claims arising under the Act. These factors concern only the minimum and overtime wages. They neither support nor suggest any Congressional policy against release of liquidated damages to which they are inapplicable and wholly unrelated.

If such an undeclared policy is to be inferred, it must be inferred from the statute, read in its appropriate setting. The statute is silent as to any exceptional policy with respect to claims for unliquidated damages—a silence which is given meaning by the provisions affirmatively making non-payment of minimum and overtime wages a public wrong. Any inference that a release of minimum and overtime wages is invalid must be because the release is an aggravation of the public wrong. But to draw that inference is to foreclose the possibility of a like inference with respect to liquidated damages, the non-payment of which is not made a public wrong.

We held in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, that the provision for liquidated damages is not punitive. Hence it cannot in itself be said either to have created or sanctioned a public right or interest in the recovery of liquidated damages. In view of the uncertain coverage of the Act we cannot ignore the fact that the statutory liability may be harsh in its application and enable the employee to recover an amount far in excess of any damage which he has in fact suffered. All these considerations persuasively suggest that Congress has adopted no policy which precludes the employee from releasing, as in the case of other claims, the claim for liquidated damages when the release conforms to local law and is procured without overreaching or unfairness. On the contrary the provisions of the Act show, and the legislative history emphasizes, that Congress intended to treat the liquidated damage obligation differently from its command to pay minimum and overtime wages. Because of this difference we cannot say that it intended to place the employee so far in tutelage as not to be free to give, and the employer to obtain, a release of what is by the terms of the statute nothing more than a cause of action for damages which in fact he may or may not have suffered.

No. 554.

There appears to have been no accord and satisfaction in this case, and for the reasons stated in our opinion in *Brooklyn Savings Bank* v. *O'Neil*, No. 445, the attempted release by respondent of his claim for overtime wages was void as against the policy of the Fair Labor Standards Act. Because of petitioner's failure to pay overtime wages as directed by § 7 of the Act, respondent is entitled to recover liquidated damages as provided by § 16(b), and the judgment should be affirmed.